CHAPTER FOUR

Party Autonomy, Intent and Conduct and the Relevance of Usages on the Buyer's Remedy of Avoidance

4.0 Introduction

The previous chapter examined the interpretive provisions of art 7 of the United Nations Convention on Contracts for the International Sale of Goods 1980[1] and the legitimacy of using the UNIDROIT Principles of Commercial Contracts to fill in gaps in the CISG.[2] It demonstrated that the use of: legislative history, analogy, general principles, academic commentary and uniform 'soft' law can assist in its interpretation. Allen states that, '[t]he operation of statute is not automatic, and can never be so. Like all legal rules, it has to take effect through the interpretation of the courts'.[3]

The thesis supports this contention and this chapter examines other CISG provisions available to the judiciary when interpreting the terms of the contract and the parties' intent in the event of a dispute. Additionally, the buyer should refer to these provisions when drafting the sales contract to reflect their contractual expectations.[4] The provisions examined here are: arts 6, 8 and 9 CISG, which deal with party autonomy, parties' intentions and usages respectively. The chapter demonstrates that these provisions can be useful in interpreting the buyer's remedy of avoidance. Specifically, the provisions can help to reduce the uncertainty of

[1] Hereinafter referred to as the 'CISG'; United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG); UNCITRAL, 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 29 September 2013.
[2] See discussion at chapter 3; Hereinafter referred to as 'UNIDROIT Principles' or 'Principles'; International Institute for the Unification of Private Law, 'UNIDROIT Principles 2010' <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 18 July 2014.
[3] Carlton Allen, *Law in the Making* (6th edn, OUP 1958) 466.
[4] See discussion at chapter 5.1.2.

establishing and exercising the buyer's right of avoidance, additionally they can help to make the buyer's remedy of avoidance suitable to deal with all types of breaches that may arise in different kinds of sale of goods contracts.[5] Where relevant, comparisons will be made with the English common law,[6] in conjunction with the Sale of Goods Act 1979,[7] dealing with party autonomy, parties' intent and usages to determine how these provisions impact on the remedy of termination of the contract.[8] Specifically do these mechanisms make English law on termination more certain and swifter to exercise? The chapter assesses whether English law would provide a more effective remedy for the buyer to use to terminate the contract.[9]

The chapter begins by examining the principle of party autonomy. Examination is made of art 6 and its impact on the buyer's right to avoid the contract.

4.1 Party Autonomy

The principle of party autonomy can be found in art 6.[10] This provision adopts the general principle of freedom of contract and will apply when the criteria of art 1 CISG are fulfilled.[11] The application of art 6 is subject to art 12, which requires that any modification or termination of a contract must be made in writing. Therefore, if

[5] For the purposes of the thesis 'suitable' means that the remedy must be capable of being applied to contracts for different kinds of goods and contracts commonly sold in international trade. Additionally the remedy must one that the parties can lawfully establish and exercise swiftly and with certainty.
[6] Hereinafter referred to as 'English law'.
[7] Hereinafter referred to as SGA; Sale of Goods Act 1979, SR & O 1983/1572.
[8] Under English law 'termination' has the same meaning as 'avoidance' under the CISG.
[9] See discussion at chapter 1.2, chapter 2.4.1 and chapter 3.7.1.
[10] CISG, art 6 states: 'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'.
[11] CISG, art 1 states: 'This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (1)(a) when the States are Contracting States; or (1)(b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention'; See also Michael Joachim Bonell, 'Article 6' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 51; See discussion at chapter 3.2.

the contracting state has made a declaration in accordance with art 96 CISG, the parties would be restricted from derogating from this requirement.[12]

The next section examines the legislative history and meaning of art 6 to determine why the provision was deemed necessary by the drafting delegates and what problems arise from its wording and interpretation.

4.1.1 Legislative History of Article 6 CISG

The antecedent to art 6 can be found in art 3 of the Uniform Law for the International Sale of Goods.[13] In the development of art 6, there were some reservations about a party with stronger bargaining powers using the provision to its own advantage.[14] It was suggested that if parties were to exclude the CISG, it be made mandatory for parties to declare what other rules would govern the contract.[15] However, this was dismissed at the 1964 Hague Conference, where a majority of delegates decided that the wording should, as far as possible, encompass the principle of freedom of contract.[16] The majority of delegations decided to delete the express reference to an 'implied' exclusion found in ULIS because it was thought that it could lead to confusion by national courts, regarding the applicability of the

[12] CISG, art 96 states: 'A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11, Article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State'.

[13] Hereinafter referred to as 'ULIS'; ULIS, art 3 states: 'The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied'.

[14] UNCITRAL, 'Yearbook: Volume I (1968-1970)' A/CN.9/SER.A/1970 <www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf> accessed 26 October 2013; Bonell (n 11) 51.

[15] See delegations from Mexico, Norway and Japan; UNCITRAL, 'Yearbook: Volume I (1968-1970)' A/CN.9/SER.A/1970 <www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf> accessed 26 October 2013; Bonell (n 11) 51.

[16] Bonell (n 11) 52.

CISG.[17] Furthermore, it was advocated that the CISG should operate on an 'opt out' rather than an 'opt-in' basis as otherwise its purpose and use would be diminished if parties disregarded its use altogether.[18]

The next section examines the implications of these contentions for the meaning and purpose of art 6.

4.1.2 Meaning and Purpose of Article 6 CISG

The wording of art 6 envisages two possible applications. First, contracting parties may decide to exclude the CISG entirely. Secondly, they may decide to use the CISG as the applicable law with derogations from and variations of certain provisions.[19] The exercise of the former application means that contracts will either be governed by uniform law or national law.[20] In regard to the latter application of art 6, the rules governing contracts and issues that fall outside the scope of the CISG will remain mandatory.[21] Therefore, they cannot be varied by art 6.[22] These include: the application of the CISG exclusively to business and not consumer contracts,[23] rules on contractual validity[24] and the effect on property in the goods sold, amongst others.[25]

As stated above, the drafters of the CISG deliberately omitted the reference to 'implied' exclusions found in art 3 ULIS.[26] However, commentators disagree on this issue. For example, Ziegel argues that the Secretariat Commentary to the CISG

[17] UNCITRAL, 'Official Records II' (1991)' A/CONF.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013.
[18] Meaning that parties would have to exclude the application of the CISG rather than expressly mention that it applied to the contract; Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 35.
[19] Bonell (n 11) 54.
[20] ibid.
[21] See for example CISG, arts 2,3,4,5 and 12.
[22] See discussion at chapter 3.2; Bonell (n 11) 54.
[23] CISG, art (a).
[24] CISG, art 4 (a).
[25] CISG, art 4 (b).
[26] UNCITRAL, 'Official Records II' (1981)' A/CONF.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013.

makes it clear that implied exclusion is *not* permitted and that, 'any doubt should be resolved in favour of the applicability of the Convention'.[27] However, Bridge[28] and Bonell[29] disagree with this approach and argue that while the word 'implied' was removed from the text during the negotiations, it was not to exclude the possibility of the parties having an implied exclusion, but rather to prevent courts from hastily reaching the conclusion that the CISG was excluded.[30] The case law on this issue is inconsistent, with some courts requiring a clear and unambiguous expression of exclusion of the CISG by the parties.[31] Other courts have permitted implicit exclusions such as the use of a choice of law clause,[32] or if one contracting party objected to the application of the CISG.[33] An implied exclusion of the CISG should be valid, otherwise the parties' intention as to the governing law of the contract may be ignored and lead to unwanted results. If the parties' implied exclusion of the CISG was ignored then such an approach would be contrary to the aim of certainty.[34] However, in order not to undermine certainty, the implied exclusion *must* be evidenced by some act to indicate the contrary intention of the parties.[35] Such acts

[27] Jacob Ziegel, 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (*IICL*, 23 April 1999) <www.cisg.law.pace.edu/cisg/text/ziegel6.html> accessed 16 November 2013.
[28] Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, OUP 2007) 537;
[29] Bonell (n 11) 55.
[30] Ingeborg Schwenzer and Pascal Hachem, 'Article 6' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 104.
[31] *American Mint LLC v GOSoftware Inc* United States 16 August 2005 Federal District Court (*IICL*, 22 September 2008) <http://cisgw3.law.pace.edu/cases/050816u1.html> accessed 15 February 2014; *Société Anthon GmbH & Co v SA Tonnellerie Ludonnaise* France 3 November 2009 Supreme Court (*IICL*, 18 March 2011) <http://cisgw3.law.pace.edu/cases/091103f1.html> accessed 15 February 2014.
[32] *Golden Valley Grape Juice and Wine LLC v Centrisys Corporation* United States 21 January 2010 Federal District Court (*IICl*, 06 May 2010) <http://cisgw3.law.pace.edu/cases/100121u1.html> accessed 15 February 2014.
[33] China 17 May 2007 Shanghai High People's Court [Appellate Court] (*Plastic inflatable swimming pools case*) (*IICL*, 12 May 2010) <http://cisgw3.law.pace.edu/cases/070517c1.html> accessed 15 February 2014.
[34] See discussion at chapter 1.0.
[35] *Golden Valley Grape Juice and Wine LLC v Centrisys Corporation* United States 21 January 2010 Federal District Court (*IICl*, 06 May 2010) <http://cisgw3.law.pace.edu/cases/100121u1.html> accessed 15 February 2014.

can include those mentioned above or some other contrary indication. In the absence of any evidence to the contrary the CISG should be the governing law if it is applicable by virtue of art 1.

Article 6 also permits the parties the right to derogate from or vary any of its provisions. Article 6 is based on the general principle of freedom of contract, a principle that can be found in other parts of the CISG such as delivery of the goods and documents,[36] conformity of the goods[37] and payment of price for the goods,[38] all of which must be performed as 'required by the contract'.[39] Therefore, in accordance with the freedom to contract, parties may derogate or vary the provisions of the CISG as they see fit. For example, parties may decide that the INCOTERMS rules set out by the International Chamber of Commerce are better suited to govern the sellers' and buyers' obligations under the contract.[40] In that case, these rules would replace the provisions of the CISG on these particular issues.[41] The principle of freedom of contract can be problematic because it permits the parties to maximise their contractual flexibility, yet raises the possibility that parties might use this flexibility to their advantage by 'forum shopping'.[42] Muir-Watt and Radicati di Brozolo state that:

> [t]he evasion of mandatory regulation through the selection of the most appropriate legal system occurs directly, as a function of the possibility for private operators either…simply to place their relationship in the legal system they deem preferable or…to choose the substantive rules governing their relationships through an amplification of the scope of traditional conflict of laws mechanisms.[43]

[36] CISG, art 30.
[37] CISG, art 35.
[38] CISG, art 53.
[39] Schwenzer and Hachem (n 30) 106.
[40] Hereinafter referred to as 'ICC'.
[41] Schwenzer and Hachem (n 30) 106.
[42] James Fawcett, Jonathan Harris and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (OUP 2005).
[43] Horatia Muir-Watt and Luca Radicati di Brozolo, 'Party Autonomy and Mandatory Rules in a Global World' (2004) 6:2 International Law FORUM Du Droit International 90, 92.

The extent of parties 'forum shopping' to avoid certain provisions of the CISG is limited, as most instruments at the international level, such as the Principles, carry with it shared aims of co-operation, good faith and fair-dealing between the parties.[44] This raises the question of whether the parties can contract out of the principles of good faith and co-operation under the CISG?[45] At the time of drafting the CISG, the Canadian delegation proposed that art 6 should stipulate that 'the obligations of good faith, diligence and reasonable care prescribed by this Convention may not be excluded by agreement'.[46] However, this was rejected[47] because the words 'diligence and reasonable care' were not mentioned in the CISG and good faith itself was relegated to interpretation rather than an obligation of the parties.[48] The decision to eliminate this proposal leaves open the issue of whether parties can choose to opt out of the rules of interpretation found in art 7.[49] There are no conclusive answers in the academic literature on this subject. The arguments for allowing parties to derogate from art 7 would include the contention that the right to derogate is only subject to art 12, so if the drafters had intended to include art 7 in the wording they would have amended the text to reflect this intention. Parties from legal systems where statutory interpretation is strict might allow this approach.[50] Furthermore, party autonomy has been cited as being a general principle of the

[44] See discussion at chapter 3.6; Silvia Ferreri, 'The Autonomous Contract and Declining Mandatory Rules. A First Reaction to an Article by Horatia Muir Watt and Luca Radicati di Brozolo' (2004) 4:3 Global Jurist 1.
[45] See discussion at chapter 3.4.3.
[46] UNCITRAL, 'Official Records II' (1981)' A/CONF.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 31 October 2013.
[47] Ulrich Schroeter, 'Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law' (2002) 6 Vindobona Journal of International Commercial Law and Arbitration 257, 260.
[48] ibid; See discussion at chapter 3.4.3.
[49] See discussion at chapter 3.4.
[50] Michael Joachim Bonell, 'Article 7' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 92 .

CISG.[51] This is supported by case law which has recognised that, 'the fundamental principle of private autonomy is confirmed…in Article 6…it allows the parties to agree upon provisions which derogate from the provisions of the Convention…'.[52] Therefore, in theory, as a general principle, parties should be free to exclude the applicability of art 7 to the contract. Nevertheless, there are also strong arguments against derogation from art 7. For instance, Bonell argues that:

> [t]o permit the parties to derogate from Article 7 by agreeing on rules of interpretation used with respect to ordinary domestic legislation would be inconsistent with the international character of the Convention and would necessarily seriously jeopardize the Convention's ultimate aim, which is to achieve worldwide uniformity in the law of international contracts of sale and to promote the observance of good faith in international trade.[53]

The thesis agrees and argues that art 7 lies at the heart of the CISG; without it the other provisions would be rendered futile as there would be no clear rules or guidelines on interpretation for decision makers to follow.[54] Excluding the applicability of art 7 from the contract would make it almost impossible to discern any general principles of the CISG and could lead to undesirable results such as recourse to domestic laws. Furthermore, art 7 emphasises the goal of uniformity, which helps to promote development in international trade and to remove legal barriers.[55] Therefore, to exclude this provision would lead to the demise of the CISG as an effective legal instrument of international sales law.[56]

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[51] Robert Hillman, ' Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21.
[52] Greece 2009 Decision 4505/2009 of the Multi-Member Court of First Instance of Athens (*Bullet-proof vest case*) (*IICL*, 4 December 2009) <http://cisgw3.law.pace.edu/cases/094505gr.html> accessed 15 February 2014; UNCITRAL, 'Digest of Article 6 case law' (*IICL*, 26 July 2012) <www.cisg.law.pace.edu/cisg/text/digest-2012-06.html#6> accessed 15 February 2014.
[53] Bonell (n 50) 93.
[54] See discussion at chapter 3.4.
[55] See discussion at chapter 3.4.2.
[56] See discussion at chapter 1.0.

Additionally, the parties cannot use art 6 to derogate from any of the final provisions,[57] as they deal with ratifications, derogations and declarations made by contracting states and are governed by public international law rather than by agreement of the parties.[58] Furthermore, it has been argued that parties would not be able to derogate from or vary the scope of art 28 CISG, which limits the courts from granting a remedy of specific performance[59] if that remedy would not be permitted under the national laws of that court.[60] This approach would be consistent with adhering to the mandatory rules of the CISG, that is, those rules that specifically exclude its application in certain circumstances. To do otherwise would extend the scope beyond what the drafters intended.[61]

The next part of this chapter examines whether the UNIDROIT Principles could help to interpret and resolve some of the ambiguities highlighted above.

4.1.3 Can the UNIDROIT Principles be used to Interpret Article 6 CISG?

The two counterparts dealing with party autonomy are found in arts 1.1 and 1.5 UNIDROIT.[62] On the issue of what form exclusion should take, the Principles goes further than the CISG, in its official commentary to art 1.5[63] it states that exclusion

[57] CISG, arts 89-101.
[58] Italy 11 January 2005 District Court Padova (*Ostroznik Savo v La Faraona soc coop arl*) (*IICL*, 01 May 2009) <http://cisgw3.law.pace.edu/cases/050111i3.html> accessed 15 February 2014; UNCITRAL, 'Digest of Article 6 case law' (*IICL*, 26 July 2012) <www.cisg.law.pace.edu/cisg/text/digest-2012-06.html#6> accessed 15 February 2014.
[59] Enforcement of the contract.
[60] CISG, art 28 states: 'If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention'; See also Italy 11 January 2005 District Court Padova (*Ostroznik Savo v La Faraona soc coop arl*) (*IICL*, 01 May 2009) <http://cisgw3.law.pace.edu/cases/050111i3.html> accessed 15 February 2014; UNCITRAL, 'Digest of Article 6 case law' (*IICL*, 26 July 2012) <www.cisg.law.pace.edu/cisg/text/digest-2012-06.html#6> accessed 15 February 2014.
[61] See discussion at chapter 3.2; See for example CISG, arts 2,3,4,5 and 12.
[62] UNIDROIT, art 1.1 states: 'The parties are free to enter into a contract and to determine its content'; UNIDROIT, art 1.5 states: 'The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles'.
[63] UNIDROIT, art 1.5 official commentary para 2.

can be express or implied.[64] Implied exclusion will be evident where parties have agreed on terms that are inconsistent with the Principles. This can be discerned from the terms negotiated or the use of standard form terms.[65] On the issue of form of exclusion, the CISG and Principles are similar, this thesis recalls that implied exclusion under the CISG should be permitted if there was some act or intent by the parties to support this exclusion. For example using a choice of law clause or making reference to rules inconsistent with the CISG would provide evidence of an implied exclusion.[66]

Both instruments promote the general principle of freedom of contract and with the exceptions in the CISG listed above,[67] the parties are free to derogate from any other non-mandatory provisions.[68] On the issue of derogation from certain rules, art 1.4 UNIDROIT states that, 'nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law'. The official commentary to this provision cites that the non-legislative nature of the Principles means that it cannot supersede national, international or supranational mandatory rules.[69] Therefore, if there are other applicable mandatory rules that govern issues such as: form of contract, illegality or effect on property, these would displace the rules contained in the Principles. This is not the case under the CISG. Once a contracting state ratifies the CISG it will take precedence over any

[64] See discussion at chapter 3.6; The International Institute for the Unification of Private Law, 'UNIDROIT Principles 2010' (UNIDROIT, 2014) <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles> accessed 04 February 2014.
[65] UNIDROIT, art 1.5, official commentary para 2.
[66] See discussion above at chapter 4.1.2; *Golden Valley Grape Juice and Wine LLC v Centrisys Corporation* United States 21 January 2010 Federal District Court (*IICl*, 06 May 2010) <http://cisgw3.law.pace.edu/cases/100121u1.html> accessed 15 February 2014.
[67] See discussion above at chapter 4.1.2.
[68] See discussion above at chapter 4.1.2 on derogation for CISG, art 7.
[69] UNIDROIT, art 1.4, official commentary para 1.

mandatory national laws on matters governed by it, barring any reservations made.[70] With regard to international laws, art 90 states that the CISG 'does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention…'. On examination of reported cases, this issue does not appear to have posed a problem for the applicability of the CISG, the only exception to this seems to be in relation to contracts between the Russian Federation and the People's Republic of China.[71] Before the ratification of the CISG both of these contracting states were signatories to an earlier agreement which governed sale of goods transactions between them.[72] In those cases where the contract made reference to the earlier agreement the courts have given effect to that agreement.[73]

Another difference between the CISG and the Principles is that art 1.5 UNIDROIT expressly makes reference in its official commentary to exclude the derogation from other provisions considered important to the application of the Principles.[74] These mandatory provisions include rules on good faith and fair dealing,[75] substantive validity,[76] limitation periods,[77] price determination[78] and agreed payment for non-performance.[79] None of these restrictions aid in interpreting or supplementing art 6 CISG for three reasons. First, good faith and fair dealing[80]

[70] CISG, arts 92, 95 and 96.
[71] Pace Law School Institute of International Commercial Law, 'Digest of Article 90 case law' (*IICL*, 31 July 2012) <www.cisg.law.pace.edu/cisg/text/digest-2012-90.html> accessed 13 August 2014.
[72] The Protocol on the General Conditions of Delivery between the USSR and the People's Republic of China (1950).
[73] Russia 2 October 1998 Arbitration proceeding 113/1997 (*IICL*, 30 July 2004) <http://cisgw3.law.pace.edu/cases/981002r1.html> accessed 22 August 2014.
[74] UNIDROIT, art 1.5, official commentary para 3.
[75] UNIDROIT, art 1.7.
[76] UNIDROIT, chap 3, except in so far as they relate or apply to mistake and to initial impossibility (UNIDROIT, art 3.1.4).
[77] UNIDROIT, art 10.3(2).
[78] UNIDROIT, art 5.1.7 (2).
[79] UNIDROIT, art 7.4.13(2).
[80] UNIDROIT, art 1.7.

are not obligations placed on the parties under the CISG, rather good faith is relegated to its interpretation, specifically 'the observance of good faith in international trade'.[81] Secondly, the issues of substantive validity[82] and limitation periods,[83] fall outside the scope of the CISG and are matters left to be governed by national laws[84] or applicable international conventions.[85] Thirdly, price determination[86] and agreed payment for non-performance[87] are not considered to be mandatory provisions under the CISG and as such, parties are free to exclude or vary these provisions.[88] Therefore, the examination of the Principles does not offer much help in interpreting the wording and meaning of art 6. The only exception to this is in regard to whether the CISG can be impliedly excluded, the conclusion being yes, as this would not be contrary to its meaning or the intention of the drafters. There must however be some indication of the parties' intention to do so.[89]

The chapter now examines the bearing of art 6 on the buyer's remedy of avoidance, specifically how derogation and variation can impact the buyer's right to establish and exercise the remedy.

4.1.4 The Impact of Article 6 CISG on the Buyer's Remedy of Avoidance

The thesis argues that while exclusion of the CISG under art 6 may seem to be the ideal option for some parties or for certain types of contracts,[90] such an approach detracts from the aim of harmonisation and the removal of barriers to international

[81] See discussion at chapter 3.4.3.
[82] UNIDROIT, chap 3, except in so far as they relate or apply to mistake and to initial impossibility see UNIDROIT, art 3.1.4).
[83] UNIDROIT, art 10.3(2).
[84] CISG, art 4(a).
[85] See for example the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).
[86] UNIDROIT, art 5.1.7 (2).
[87] UNIDROIT, art 7.4.13(2).
[88] Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 10: Agreed Sums Payable upon Breach of an Obligation in CISG Contracts' (*IICL*, 08 January 2013) <www.cisg.law.pace.edu/cisg/CISG-AC-op10.html> accessed 14 August 2014.
[89] See discussion above at chapter 4.1.2.
[90] See discussion at chapter 2.4.1.

trade.[91] When art 6 is used by the contracting parties the provision can establish contractual expectations without resort to the default position in the CISG or to national law.[92] It is important to consider how the buyer could use the provisions of art 6 to agree their own standards for exercising the remedy of avoidance. With this in mind the reported case law was examined to find examples of this in practice. Although there were no reported cases on the issue of derogating from or varying the definition of 'fundamental breach',[93] in theory this approach is possible and permissible under the CISG. Buyers could set their own threshold as to what 'such detriment to …substantially to deprive…of what he is entitled to expect under the contract' would mean. This argument could also be applied to the standards of conformity of the goods found in art 35 CISG.[94] Additionally, the buyer could use art 6 to preclude the seller's right to cure the breach[95] or alternatively the buyer could restrict the right to cure to a specific period of time.[96] For example, the buyer could derogate from the wording of a 'reasonable time' for cure under art 48 CISG and instead state that the seller must cure the breach within five working days otherwise the contract will be avoided. Another area where the buyer could use art 6 to set their contractual expectations is to vary the notice provisions under the CISG.[97] An examination of the case law found examples where the buyer could derogate from the 'reasonable time' period for notice of non-conformity in art 39(1) CISG by

[91] See discussion at chapter 1.0.
[92] Ulrich Schroeter, 'Article 25' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 409.
[93] CISG, art 25.
[94] See discussion at chapter 5.2.7.1 and chapter 5.2.7.3.
[95] CISG, arts 34, 37 and 48.
[96] See discussion at chapter 6; Schwenzer and Hachem (n 30) 116.
[97] See discussion at chapter 2.4.5, chapter 5.2.7 and chapter 7; CISG, art 26 (Notice of Avoidance); CISG, art 39 (Notice of Non-conformity).

stating that notice must be given 'within five working days from the delivery'.[98] Therefore, art 6 can be used to make the buyer's right of avoidance more clear and concise, reducing the uncertainty associated with establishing and exercising the remedy.

The next section of this chapter examines whether English law will offer the buyer the same measure of autonomy as art 6.

4.1.5 The English Law Approach to Party Autonomy

Although the SGA has endeavoured to codify the common law on sale of goods, some areas were left out of the statutory framework and are governed by the common law.[99] This is reflected in s 62(2) SGA.[100] Thus, contracting parties choosing 'English law' as the governing law of the contract are agreeing to the applicability of both the common law and the SGA. The latter provides no mechanism for 'contracting out' of it entirely. That said, Sir Mackenzie Chalmers, who drafted the original Act stated that 'sale is a consensual contract, and the Act does not seek to prevent the parties from making any bargain they please. Its object is to lay down clear rules for the case where the parties have either formed no

[98] Netherlands 11 February 2009 Rechtbank District Court Arnhem (*Tree case*) (*IICL*, 03 September 2009) <http://cisgw3.law.pace.edu/cases/090211n1.html> accessed 15 February 2014; UNCITRAL, 'Digest of Article 6 case law' (*IICL*, 26 July 2012) <www.cisg.law.pace.edu/cisg/text/digest-2012-06.html#6> accessed 15 February 2014.

[99] In chapter three of the thesis, an examination was made of the English law on termination of the contract. The purpose of this examination was to determine if the English common law in conjunction with the SGA could provide more certainty and require less stringent standards to terminate the contract as claimed by some scholars; Alastair Mullis, 'Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law: Is There a Substantial Difference?' in Eva Lomnicka and Christopher Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honor of Prof AG Guest* (Sweet & Maxwell 1997) 137; Michael Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 Pace Int'l L Rev 55;See also Nicholas Ryder, Margaret Griffiths and Lachmi Singh, *Commercial Law Principles and Policy* (CUP 2012) 64.

[100] SGA, s 62(2) states: 'The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods'.

intention, or failed to express it'.[101] This aim of freedom of contract is reflected in the wording of most provisions of the SGA. For example the rules governing: time,[102] when breaches of conditions can be treated as warranties,[103] rejection for trivial breaches,[104] passing of property and risk,[105] payment and delivery[106] amongst others can all be varied by the parties' agreement. The wording of these provisions indicates that variations can be express or implied from the contract.[107] The only exception to the principle of freedom of contract relates to the implied terms found in ss 12-15 SGA. Section 12 deals with implied terms as to title, under s 6(1) Unfair Contract Terms Act 1977[108] the seller's liability for a breach of this section cannot be excluded or restricted in any way.[109] The reason for this is that passing title to the goods is fundamental to the contract. Therefore, English law regards a breach of s 12 as the buyer having received nothing under the contract, that is, a total failure of consideration.[110] The other implied terms under ss 13-15[111] can be excluded or restricted under s 6(3) UCTA if they satisfy the requirement of reasonableness.[112]

Therefore, if we compare the CISG and English law on the issue of party autonomy, we can see that they are both flexible instruments designed to

[101] Mackenzie Chalmers, *Sale of Goods Act 1893* (W Clowes & Sons 1894).
[102] SGA, s 10.
[103] SGA, s 11(4).
[104] SGA, s 15A(2).
[105] SGA, ss 17 and 20.
[106] SGA, s 28.
[107] SGA, s 15A(2).
[108] The CISG does not deal with unfair terms such matters are left to national laws, however parties choosing English law to govern the sales contract must be aware of the legal instruments that could affect the outcome of the contract.
[109] Hereinafter referred to as 'UCTA'.
[110] See discussion at chapter 3.7.4; *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286; Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987).
[111] Sellers' implied undertakings as to: s 13 conformity of goods with description, s 14 their quality or fitness for a particular purpose or s 15 sample).
[112] The test of reasonableness is set out in UCTA, s 11, which states factors such as: the bargaining strength of the parties, inducements to agree to the term, whether the other party knew or ought to have known of the term amongst other factors will be considered. If the exclusion or restriction is not considered reasonable it will have no effect on the application of SGA, ss 13-15; See also UCTA, Sch 2.

accommodate the parties' expectations under the contract. The CISG may have the advantage over the SGA in some respects as the latter will restrict the exclusion of s 12 SGA altogether.[113] Moreover the exclusion of implied terms found in ss 13-15 SGA will depend on whether they are reasonable under UCTA, which could prove uncertain. As ss 13-15 deal with conformity of the goods, a highly litigated area in international sales,[114] the parties may find their freedom to contract restricted under English law.[115]

The thesis proceeds to summarise the conclusions reached on the issue of party autonomy under the CISG. In light of the examination above, it is arguable that art 6 can be used by the buyer to sharpen and define the rules governing the contractual agreement. Specifically, art 6 can be used to reduce uncertainty and promote predictability in establishing and exercising the buyer's remedy of avoidance. In subsequent chapters it will be demonstrated that this approach reflects the flexible nature of the CISG and makes it a suitable instrument for international sale of goods.[116]

The next part of the chapter examines art 8 CISG which deals with interpretation of the parties' intentions and conduct. This provision is relevant in determining the buyer's contractual expectations and whether the breach has caused substantial detriment to his interests, allowing avoidance of the contract.[117]

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[113] The CISG does not contain any provisions to deal with exclusion clauses, however the principle of party autonomy under art 6 permits parties the right to include them in the sales contract. Article 4 stipulates that the validity of these clauses will be governed by the applicable domestic law.

[114] Leonardo Graffi , 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention' (2003) 3 IBLJ 338, 341; Benjamin Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Sellier 2007) 3.

[115] The thesis will examine this issue further in chapter five when examining breaches for non-conformity of the goods. Examination will be made of case decisions under the CISG and those resulting from the SGA to determine if there is a difference in approach and whether English law would provide a more certain outcome to the buyer's right to terminate the contract.

[116] Text to n 5.

[117] See discussion at chapter 5.1.2.

4.2 Parties' Intentions and Conduct

In determining whether the breach is sufficiently serious to amount to a fundamental breach, permitting the buyer the right to claim avoidance of the contract, it is sometimes necessary to examine the intentions and conduct of the parties and well as surrounding circumstances. Article 8 embodies the rules for interpretation of the intention and conduct of the parties; it also includes any statements made by the parties.[118] Article 8(1) makes reference to the subjective test, whereas art 8(2) looks at the understanding of the reasonable person, or the objective test. Article 8(3) directs judges to look at all relevant circumstances, including pre-contractual dealings to determine the intent of the party.

4.2.1 Legislative History of Article 8 CISG

The origins of art 8 differ from other parts of the CISG because it was not founded on antecedent legislation such as ULIS or Uniform Law on the Formation of Contracts for the International Sale of Goods.[119] Instead it was based on the UNIDROIT Draft Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods.[120] The drafting delegation found it difficult to agree on whether the rules of interpretation of a party's intention and conduct should be confined to the formation of the contract or extend to interpret the

[118] CISG, art 8 states: '(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'.

[119] Hereinafter referred to as 'ULF'; E Farnsworth, 'Article 8' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 95; See also ULVC, arts 3, 4 and 5.

[120] A/CN.9/146; Farnsworth (n 119) 95.

whole of the contract.[121] The issue was resolved in favour of the latter approach, thus art 8 was to be read as not only to interpret unilateral acts and statements as to whether the contract was concluded but also to include interpretation of the whole contract.[122]

The next part of the chapter examines the wording of art 8 to determine if the interpretation of this provision could result in ambiguity or uncertainty as to its meaning.

4.2.2 Meaning and Purpose of Article 8 CISG

It was the intention of the drafting delegation that the scope of art 8 should not be limited to issues relating to offer and acceptance, instead it was designed to cover the interpretation of other areas such as avoidance of the contract.[123] Although the provision covers the interpretation of the whole contract, the time for determining the intent of the party is not when the dispute arises, but rather when the contract was concluded.[124] The reason being that a party will always argue that a term should be given the meaning that is attached at the time of dispute whereas the true intent was formed at the time the contract was concluded.[125] The thesis agrees with this reasoning and argues that it upholds the general principles of reasonableness and the observance of good faith under the CISG. Furthermore, the approach follows the same rationale as the time for foreseeability under art 25 CISG, this provision sets

[121] Hereinafter referred to as 'ULVC'; UNCITRAL, 'Yearbook: Volume IX (1978)' A/CN.9/SER.A/1978 <www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf> accessed 24 February 2014; See also Farnsworth (n 119) 96.
[122] UNCITRAL, 'Yearbook: Volume IX (1978)' A/CN.9/SER.A/1978 <www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf> accessed 24 February 2014; See also Farnsworth (n 119) 96.
[123] UNCITRAL, 'Yearbook: Volume IX (1978)' A/CN.9/SER.A/1978 <www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf> accessed 24 February 2014; See also Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods* (Oceana 1992) 61.
[124] Farnsworth (n 119) 98.
[125] ibid.

out the test for fundamental breach.[126] This is one of the main requirements the buyer must establish if he wishes to avoid the contract. The wording of art 25 makes it clear that the breaching party could escape liability for fundamental breach if he or she or the reasonable person would not have foreseen the result. Although the CISG does not expressly address the issue of time for foreseeability, commentators and case law support the approach that this should be judged at the time of the conclusion of the contract.[127] Therefore, it would be prudent for the parties' intent under art 8 to be judged at the same time as for foreseeability under art 25, otherwise one party could provide the other party will additional information *after* the conclusion of the contract and this could change the threshold for fundamental breach.[128] This would be unfair if the party has already embarked on performance of the contract and is unable to change the course of action.

The next issue examined is the relevant standards of interpretation used by judges under art 8. Article 8(1) establishes a subjective test, directing judges to look at the actual intention of the parties.[129] However, it is for the party making the statement or conduct to prove that, 'the other party knew or could not have been unaware what that intent was.' This can be a very difficult burden to discharge if the contractual terms do not reflect this intention. Nonetheless, if it can be proven then, according to art 8, this will take precedence over any other reasonable

[126] CISG, art 25 states: 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'.
[127] See discussion at chapter 5.1.2; Robert Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' in Pace (eds), *Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer 1999) 264; See also Germany 24 April 1997 Appellate Court Düsseldorf (*Shoes case*) (*IICL*, 8 June 2006) <http://cisgw3.law.pace.edu/cases/970424g1.html> accessed 22 August 2014; Alexander Lorenz, 'Fundamental Breach under the CISG' (*IICL*, 21 September 1998) <www.cisg.law.pace.edu/cisg/biblio/lorenz.html> accessed 22 August 2014; cf Graffi (n 114) 339.
[128] Lorenz (n 127).
[129] Farnsworth (n 119) 98.

interpretation.[130] In a case involving a machine for repairing bricks, the court allowed the buyer to claim fundamental breach for non-conformity stating that art 8(1) required discerning, 'the real intent of a contracting party -- without going so far as a psychological investigation -- so that, if the terms of the contract were clear, there was an obligation to abide by the literal meaning'.[131] Hence, relying on art 8(1) to prove intent does not pose a problem where there is clear and unambiguous evidence of that intent in the contractual terms.

If the buyer wanting to rely on intent is unable to meet the subjective test of art 8(1), then reference must be made to art 8(2). This states that regard is to be made to, 'the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances'. Article 8(2) is not indicative of a purely objective test; rather, reference is made to a reasonable person of the same kind.[132] This would include qualities relating to language, skill and trade knowledge.[133] Thus, even if the other party was not actually aware of the intent, if a reasonable person of the same kind in those same circumstances would have known of the intent, the claim will succeed. Article 8(2) adopts the common law rule of *contra proferentem*, whereby ambiguities in the wording of the contract are resolved against the party seeking to rely on it. However, it can be argued that the application of art 8(2) could have an adverse effect on the party who may not be familiar with certain terminology or how that term may be interpreted in a national court.[134] The thesis rejects this contention and suggests that this argument could be applied to *any* choice

[130] UNCITRAL, 'Yearbook: Volume IX (1978)' A/CN.9/SER.A/1978 <www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf> accessed 24 February 2014; Farnsworth (n 119) 98.
[131] Spain 27 December 2007 Appellate Court Navarra (*Case involving machine for repair of bricks*) (*IICL*, 18 March 2011) <http://cisgw3.law.pace.edu/cases/071227s4.html> accessed 14 August 2014.
[132] Enderlein and Maskow (n 123) 64; See also Farnsworth (n 119) 99.
[133] Farnsworth (n 119) 99.
[134] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 117.

of law clause that foreign parties may use to govern the contract. The CISG, at the very least, offers parties a compromise in that it is an international instrument, it is equally accessible to all parties and its text has been translated into six official languages.[135] Furthermore, contracting parties under the CISG are business people who should be familiar with the particularities of their area of trade or have access to legal advice when in doubt.

It is possible that a party's true intent may not be discernible by applying either arts 8(1) or 8(2), and therefore there is no meeting of the minds.[136] The thesis dismisses this stance and argues that the general principle of reasonableness under the CISG will always reach a conclusion agreeing with the claims made by of one of the parties.[137] Holmes also dismisses the idea that intent may be elusive after the application of either test, stating that, '[t]he law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals'.[138] This thesis supports this view and notes that this is reflected in the wording of art 8(3) which provides a non-exhaustive list for determining intent which includes: negotiations, practices which the parties have established between themselves, usages and subsequent conduct of the parties. Therefore, it can be argued that given the numerous ways intent can be discerned under art 8, examination of the facts of the case coupled with application of its provisions must always produce a decision. If there is still doubt as to the parties' intent after consulting the various methods of discerning intent, then one has to question whether the contract fulfilled the criterion of an 'offer' set out in art 14 CISG which states an offer must be 'sufficiently

[135] See discussion at chapter 3.1.
[136] Honnold (n 134) 117.
[137] Honnold (n 134) 118; See also Farnsworth (n 119) 101.
[138] Oliver Wendell Holmes, *The Common Law* (Dover 1963) 242.

definite'. If the contract fails to meet this criterion, it may not have been validly concluded.

The next issue to be examined is what types of evidence will be considered under art 8(3) to adduce the parties' intent. Although the CISG does not expressly deal with the issue of the parole evidence rule, it can be argued that the wording of art 8(3) impliedly excludes the existence of such a rule. This is also supported by the case law.[139] The thesis recalls the discussion in chapter three where it was explained that the parole evidence rule is found in common law jurisdictions and based on the principle that the written contract is the only evidence of a contractual agreement, thus extrinsic evidence will not be considered by the courts.[140] Therefore, it is necessary to examine the issue of entire agreement clauses, sometimes referred to as whole agreement, integration or merger clauses. The function of these clauses is to limit or exclude the possibility of the courts considering any extrinsic evidence other than the contract itself. The interpretation of these clauses is important because if the parties have expressly agreed that the written agreement will form the whole of the contract then according to art 6 and the principle of freedom of contract, parties can derogate from the application of art 8.[141] This would mean that no further evidence should be introduced to adduce the contract.[142] Case law on this issue has been inconsistent. For example, in *MCC-Marble Ceramic Center v Ceramica Nuova*

[139] See discussion at chapter 3.4.1; Honnold (n 134) 120; See also *Beijing Metals & Minerals v American Business Center* F 2d 1178, 1183 (5th Cir 1993); David Moore, 'The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying *Beijing Metals & Minerals Import/Export Corp v American Business Center Inc*' (1995) BYU L Rev 1347; cf *MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino* United States 29 June 1998 Federal Appellate Court [11th Circuit]; *Filanto v Chilewich* 2nd instance Circuit Court of Appeals, 984 F 2d 58 (2d Cir 1993).

[140] Unless one of the exceptions applies, these include: if the written contract is not the whole of the agreement, evidence as to validity of the contract, terms implied by law, evidence as to capacity of parties, to aid in construction of the contract, to prove custom, rectification and to show evidence of a collateral contract.

[141] See discussion above at chapter 4.1.2.

[142] Joseph Perillo, 'Match-up of CISG Article 8 with counterpart provisions of UNIDROIT Principles' (*IICL*, 5 January 2007) <www.cisg.law.pace.edu/cisg/principles/uni8.html> accessed 02 March 2014.

D'Agostino the court recommended the use of merger clauses to omit prior agreements and understandings.[143] Conversely, in *TeeVee Tunes Inc et al v Gerhard Schubert GmbH* the court stated that 'extrinsic evidence should not be excluded, unless the parties actually intend the merger clause to have this effect' and that 'Article 8 requires an examination of all relevant facts and circumstances when deciding whether the merger clause represents the parties' intent....That is, to be effective, a merger clause must reflect "the parties" intent'.[144] Therefore, for the merger clause to take effect over the provisions of art 8(3), it would have to be demonstrated that this was the common intention of the parties, or alternatively the other party could not have been unaware of the intention or a reasonable person of the same kind would have had this intention. Paradoxically the courts would need to use art 8 to determine if the parties' intent upon incorporating the merger clause was to exclude the application of the very same provision. The use of these clauses could have an impact on the buyer's right to avoid the contract. An example of this can be seen in a case involving the sale of a packaging machine.[145] Although the contract stated that the machine was intended to package vials containing substances produced by the buyer's company, the contract did not stipulate the actual velocity of the machine. The buyer claimed that the machine was non-conforming to the contract as it could not achieve the necessary speed of output. The seller disputed this claim on the grounds that there was no agreement on the velocity of the machine. In this case the court had to refer to the pre-contractual negotiations including emails and draft contracts to ascertain that the buyer had at numerous

[143] *MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino* United States 29 June 1998 Federal Appellate Court [11th Circuit].
[144] United States 23 August 2006 Federal District Court [New York] (*TeeVee Tunes Inc et al v Gerhard Schubert GmbH*) (*IICL*, 17 February 2009) <http://cisgw3.law.pace.edu/cases/060823u1.html> accessed 02 March 2014.
[145] Switzerland 8 November 2006 Civil Court Basil-Stadt (*Packaging machine case*) (*IICL*, 15 September 2009) <http://cisgw3.law.pace.edu/cases/061108s1.html> accessed 22 August 2014.

times made known to the seller that the machine must be capable of producing at least 180 vials per minute. As the machine could at best only produce 122 vials per minute this was held to be a fundamental breach entitling the buyer to avoid the contract.[146] In this case we can see that if the parties had excluded the applicability of art 8(3) by virtue of a merger clause the buyer would not be entitled to avoid the contract as no further evidence would be examined to discern the parties' intent.

The next part of the chapter examines whether the UNIDROIT Principles can be used to clarify any ambiguities in the wording and interpretation of art 8.

4.2.3 Can the UNIDROIT Principles be used to Interpret Article 8 CISG?

The counterpart to art 8 can be found in the Principles arts 4.1 through 4.8. The wording of arts 4.1 through 4.3 UNIDROIT on the issues of parties' intentions and conduct are broadly similar to that of the CISG. For example, art 4.1(1) states that the contract should be interpreted in light of the common intention of the parties, however, if no common intention can be ascertained, the objective standard of the reasonable person of the same kind should be used.[147] Article 4.2(1) uses the subjective standard to interpret statements and other conduct, if this cannot be established the objective standard should be applied.[148] Article 4.3 sets out a list of factors to be considered to determine the parties' intent and includes: preliminary

[146] ibid.
[147] UNIDROIT, art 4.1(2) states: 'If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances'.
[148] UNIDROIT, art 4.2(2) states: 'If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances'.

negotiations,[149] practices,[150] conduct after contract concluded,[151] nature and purpose of contract,[152] meaning of terms in trade[153] and the interpretation of usages.[154]

The other rules in arts 4.4 through 4.8 are more detailed and explicitly address issues that are ambiguous or absent in the CISG. Article 4.4 states that terms should be interpreted with regard to the whole of the contract, this approach is consistent with the legislative history of art 8 CISG - as discussed above, the intent of the delegates was that art 8 should apply to the whole of the contract and not just to the conclusion of the contract.[155] Article 4.5 goes on to state that if a term remains unclear, it is to be given effect rather than to be deprived of its effect.[156] Thus, if one party argues that the term in dispute should have a meaning that would deprive the term of effect, the other party's meaning attributed to that term will prevail. The rule in art 4.5 is based on the premise that parties would not include words in the contract if they did not intend for them to serve a purpose.[157] While this argument does bear merit, the thesis raises some concern with the application of art 4.5 to standard form contract terms. Standard form contracts are commonplace in international sale of goods, including contracts for manufacturing, resale and delivery of goods.[158] These contracts contain terms that are not negotiated in advance between the parties and

[149] UNIDROIT, art 4.3 (a).
[150] UNIDROIT, art 4.3 (b).
[151] UNIDROIT, art 4.3 (c).
[152] UNIDROIT, art 4.3 (d).
[153] UNIDROIT, art 4.3 (e).
[154] UNIDROIT, art 4.3 (f).
[155] UNIDROIT, art 4.4 states: 'Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear'.
[156] UNIDROIT, art 4.5 states: 'Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect'.
[157] UNIDROIT, art 4.5, official commentary para 1.
[158] Ulrich Magnus, 'Incorporation of Standard Contract Terms under the CISG' in Camilla Andersen & Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill 2008) 323.

may be used as part of a framework and referred to in the main contract.[159] For example the contract of sale may make reference to standard delivery terms in the contract of carriage but the buyer may be unaware of the exact content of these terms until after the contract of sale is concluded. Examination of the case law on this issue reveals that this has been a problematic area. The general consensus is that in applying art 8 CISG, the buyer must be aware of the incorporation of the term in a reasonable manner before the conclusion of the contract.[160] This could include an obligation on the seller to transmit to the buyer the text of the standard form terms and conditions.[161] Additionally if the standard terms are written in a different language to that of the sales contract, it must be translated for the buyer.[162] If there is any ambiguity as to whether the terms have been incorporated, they will not form part of the contract.[163] Furthermore, if they 'differ from the expectation of the contractual partner to such an extent that the latter cannot reasonably be expected to have anticipated that such a clause might be included' they will not form part of the contract.[164] Thus, it could be argued that if art 4.5 UNIDROIT were to be applied to the contract, the buyer may be left without a remedy if he were to claim that the term

[159] Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 13: Inclusion of Standard Terms under the CISG' (*IICL*, 01 May 2013) <www.cisg.law.pace.edu/cisg/CISG-AC-op13.html> accessed 14 August 2014.
[160] Germany 31 October 2001 Supreme Court (*Machinery case*) (*IICL*, 15 November 2007) <http://cisgw3.law.pace.edu/cases/011031g1.html> accessed 22 August 2014; Austria 8 August 2005 Appellate Court Linz (*Spacers for insulation glass case*) (*IICL*, 15 February 2007) <http://cisgw3.law.pace.edu/cases/050808a3.html> accessed 22 August 2014; Italy 24 August 2006 Tribunale [District Court] di Rovereto (*Euroflash Impression Sas v Arconvert SpA*) (*IICL*, 10 November 2008) <http://cisgw3.law.pace.edu/cases/060824i3.html> accessed 22 August 2014; Netherlands 21 January 2009 District Court Utrecht (*Sesame seed case*) (*IICL*, 26 November 2012) <http://cisgw3.law.pace.edu/cases/090121n1.html> accessed 22 August 2014.
[161] Germany 15 October 2009 District Court Stuttgart (*Printing machine case*) (*IICL*, 08 March 2010) <http://cisgw3.law.pace.edu/cases/091015g1.html> accessed 22 August 2014.
[162] Italy 21 November 2007 *Tribunale* [District Court] Rovereto (*Takap BV v Europlay Srl)* (*IICL*, 26 November 2012) <http://cisgw3.law.pace.edu/cases/071121i3.html> accessed 22 August 2014.
[163] United States 8 February 2011 Federal District Court [Maryland] (*CSS Antenna, Inc v Amphenol-Tuchel Electronics GMBH*) (*IICL*, 09 June 2011) <http://cisgw3.law.pace.edu/cases/110208u1.html> accessed 22 August 2014.
[164] Germany 12 June 2008 District Court Landshut (*Metalic slabs case*) (*IICL*, 18 July 2008) <http://cisgw3.law.pace.edu/cases/080612g2.html> accessed 22 August 2014.

should be deprived of effect as he may have been unaware of the term. However, this may be counter-balanced by the official commentary to art 4.5 which indicates that the rule will only be applied if the term satisfies the rules of interpretation set out in arts 4.1 through 4.3 UNIDROIT.[165] Therefore, the rule will only be applied if the buyer could not have been unaware of the term or a reasonable person of the same kind would have been aware of the term.

Article 4.6 UNIDROIT expressly incorporates the *contra proferentem* rule, therefore a party inserting an ambiguous term into the contract, will have that term interpreted against them in the event of a dispute.[166] This provision expressly embodies the implied meaning of art 8(2) CISG, where in the absence of the parties' actual intention the courts will interpret the term by reference to the objective standard even if that was not the meaning intended by the party who drafted the term. Following from this, art 4.7 states that if the contract is drawn up in two or more languages and there is a linguistic discrepancy as to the meaning of the terms, then preference shall be given to the original version.[167] Although this issue is not expressly covered in the CISG, the wording of art 7 can incorporate this approach as it stipulates interpretation should be carried out with the observance of good faith in international trade.[168] Thus in the absence of the parties' stipulations as to which version should prevail, preference should be given to the original version as this would have reflected the parties' original intent. The final provision dealing with intent under the Principles is art 4.8 which permits supplying an omitted term to

[165] UNIDROIT, art 4.5, official commentary para 1.
[166] UNIDROIT, art 4.6 states: 'If contract terms supplied by one party are unclear, an interpretation against that party is preferred'.
[167] UNIDROIT, art 4.7 states: 'Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up'.
[168] See discussion at chapter 3.4.3.

determine the parties' rights and duties.[169] The wording indicates regard is to be had to: the parties' intentions, nature and purpose of contract, good faith and fair dealing and reasonableness.[170] This provision raises some concern as at first glance it appears that the terms will be supplied on the same basis as the mechanisms[171] and general principles[172] found in the CISG, but two points must be noted. First, it is not clear whether it was the intention of the drafters of the CISG that decision makers would *create* terms in the contract, rather than merely interpret the contract. Secondly, art 4.8(2) UNIDROIT stipulates that one of the factors for determining the omitted term is good faith and fair dealing. The thesis recalls the discussion in chapter three where it was highlighted that under the Principles good faith is an obligation placed on the parties whereas under the CISG it is only used as a tool of interpretation.[173] Therefore art 4.8 appears to be irreconcilable with the scope of art 8 CISG.

After examination of whether the Principles can be used to supplement and interpret gaps in art 8 CISG, the thesis has demonstrated that in some cases the two instruments are complementary.[174] The wording of the Principles go further than art 8 CISG and expressly incorporates the implied intentions of the drafters of the CISG - this can be seen in art 4.4 which states that terms will be interpreted in light of the whole of the contract, and art 4.6 the which incorporates the *contra proferentem* rule. However, the thesis has demonstrated that art 4.5 which gives effect to a term rather

[169] UNIDROIT, art 4.8 states: '(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness'.
[170] UNIDROIT, art 4.8(2).
[171] CISG, art 6 (party autonomy) express terms of the parties; CISG, art 8 (intent).
[172] Good faith and reasonableness.
[173] See discussion at chapter 3.6; UNIDROIT, art 1.7; CISG, art 7(2).
[174] UNIDROIT, arts 4.1-4.4, 4.6 and 4.7; Perillo (n 142).

than to deprive it of its meaning may prove problematic for standard form contracts, furthermore art 4.8 which deals with supplying omitted terms falls outside the scope of the CISG.

The next part of the chapter will examine how the use of art 8 could help to clarify when the buyer has the right to avoid the contract. This provision will prove important when examining fundamental breach and whether the parties' contractual expectations have been met.

4.2.4 The Impact of Article 8 CISG on the Buyer's Remedy of Avoidance

The interpretive rules as to intent and conduct of the parties play a significant role in determining whether the buyer's remedy of avoidance can be lawfully exercised, specifically whether the threshold for a fundamental breach has been established.[175] Article 8(1) makes it clear that the party's subjective intent will be taken into account and this intent will be ascertained from the terms of the contract. In the absence of the subjective intent, art 8(2) looks at how the reasonable person of the same kind would have understood the meaning of the statement or conduct. Article 8(3) dictates that intent will be gathered from all the relevant circumstances including negotiations, practices, usages and subsequent conduct of the parties. Article 8 will be an important tool in deciding whether the buyer can avoid the contract. This can be seen in a case decided by the China International Economic & Trade Arbitration Commission[176] for the delivery of steel cylinders.[177] The contract stipulated that the cylinders should be brand new and manufactured in New Zealand. Upon arrival the goods were non-conforming as some of the cylinders were used and were not manufactured in New Zealand, furthermore the identification documents

[175] Leisinger (n 114) 43.
[176] Hereinafter referred to as 'CIETAC'.
[177] China 19 January 2000 CIETAC Arbitration proceeding (*Steel cylinders case*) (*IICL*, 27 October 2008) <www.cisg.law.pace.edu/cisg/wais/db/cases2/000119c1.html> accessed 24 August 2014.

were not related to the goods delivered. The arbitral commission, applying art 8, stated that the terms of the contract made it clear what the buyer's expectations were, thus the seller could not have been unaware of this intent nor would the reasonable person have been unaware of the intent. The buyer was allowed to avoid the contract for fundamental breach.[178]

It must be noted that intent could also work *against* the buyer if no such intent is discernible from the contract or the surrounding circumstances. For example, in a case heard by the Chambre Arbitrale de Paris, involving the sale of a chemical compound, the buyer accepted the goods 'without any claims regarding the quality' and then resold them to a third-party.[179] The third-party rejected the goods because it contained hard lumps and the buyer sought to bring an action against the seller for non-conforming goods. The court rejected this claim because it concluded that the buyer could not have been unaware of the state of the goods on accepting them as they were visible on examination. Furthermore the buyer had failed to stipulate any terms as to the standards of conformity in the contract, therefore they could not later try to invoke such a term.[180]

The next part of this chapter examines how English law would approach the issues of parties' intent and conduct under the contract to determine if these laws would provide a more comprehensive approach than the CISG.[181]

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[178] ibid.

[179] Arbitration Chamber of Paris Case No 9926 of 2007 [assumed date] (*Chemical compound case*) (*IICL*, 01 May 2009) <http://cisgw3.law.pace.edu/cases/079926f1.html> accessed 24 August 2014.

[180] See discussion at chapter 5.2.7.3; Arbitration Chamber of Paris Case No 9926 of 2007 [assumed date] (*Chemical compound case*) (*IICL*, 01 May 2009) <http://cisgw3.law.pace.edu/cases/079926f1.html> accessed 24 August 2014; The relevance of art 8 on the buyer's right to avoid the contract will be examined further in chapter five of the thesis.

[181] One of the aims of the thesis is to compare the CISG's provisions on the buyer's right to avoid the contract with English law on the buyer's right to terminate the contract. This comparison is to respond to claims that English law is better suited to international sale of goods contracts. In chapter three, the thesis examined the classification of terms under English law, whereby only breaches of conditions or innominate terms with serious consequences allowed for termination of the contract.

4.2.5 The English Law Approach to Parties' Intentions and Conduct

Prior to commencing an examination of the English law on discerning parties' intent and conduct it is first necessary to distinguish between different types of statements for the purposes of English law. In English contract law, not all statements will amount to terms of the contract. For example, some statements will amount to representations, which are statements that do *not* form part of the contract but nevertheless can have serious consequences.[182] A representation may be actionable if it turns out to be false and it induced the buyer to enter into the contract.[183] Under English law, whether a statement forms part of the contract will depend on the intentions of the parties.[184] The test is objective, which means that regard should be had to whether the reasonable person would conclude that the party intended to be bound by the truth of the statement.[185] In *Inntrepreneur Pub Co v East Crown Ltd* it was stated that there was a rebuttable presumption that the written agreement contained all of the relevant terms.[186] The presumption is strengthened if there was a significant lapse of time between the making of the statement and the conclusion of the contract.[187] The common law provides some guidelines for the courts to apply when deciding if a pre-contractual statement is a term or representation. For example, if one party accepts the responsibility for the statement[188] or the party making the statement has specialist knowledge, it is more likely that the court will conclude that it is dealing with a contractual term.[189] The discretion given to the court to decide whether a statement is a term or a

[182] John Adams and Hector Macqueen, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 93.
[183] Jill Poole, *Textbook on Contract Law* (9th edn, OUP 2008) 540.
[184] Adams and Macqueen (n 182) 93.
[185] *Heilbut, Symons & Co v Buckleton* [1913] AC 30.
[186] [2000] 2 Lloyd's Rep 611.
[187] Poole (n 183) 209.
[188] *Schawel v Reade* [1913] 2 IR 81.
[189] *Dick Bentley (Productions) Ltd v Harold Smith Motors Ltd* [1965] 2 All ER 65; cf *Oscar Chess Ltd v Williams* [1957] 1 WLR 370.

representation creates uncertainty.[190] Poole states that it 'allows the courts to pick and choose those representations which are to have contractual status…predictability suffers as a consequence of this rule'.[191] This uncertainty is demonstrated in the cases of *Hopkins v Tanqueray*[192] and *Couchman v Hill*.[193] Both cases dealt with similar issues concerning warranties given to the goods, however in the former case the warranty was held to be a mere representation whereas in the latter it was a term of the contract. Adams and MacQueen state that, 'the tendency these days frequently appears to be for the courts to hold a statement to be a term of the contract when they think it reasonable to impose liability in damages on the person making the statement'.[194] They added that these circumstances include, 'where the person making it [the statement] had, or could reasonable have obtained, the information necessary to show whether the statement is true'.[195]

The thesis will not pursue any further in-depth examination of the law governing representations as such discussion falls outside the scope of the thesis. However, it is important to highlight three points on the impact this area may have on the buyer choosing English law as the governing law of the contract. Firstly, if the statement does not form part of the contract but nevertheless has detrimental consequences, the buyer may wish to bring an action for misrepresentation. This can be done under the common law[196] or by statute under the Misrepresentation Act 1967.[197] The remedies

[190] Poole (n 183) 212.
[191] ibid.
[192] (1854) 15 CB 130.
[193] [1947] KB 554.
[194] Adams and Macqueen (n 182) 94.
[195] ibid.
[196] Fraudulent Misrepresentation: *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; Negligent Misrepresentation: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
[197] Hereinafter referred to as 'MRA'; MRA, s 2(1) states: 'Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had

for misrepresentation include rescission and damages. It is important to point out that rescission differs from termination in the sense that it seeks to revert the parties to their pre-contractual position, that is, it sets aside the contract.[198] Secondly, damages for misrepresentation are calculated differently from damages for termination of the contract.[199] Thirdly to complicate matters further, s 1(a) MRA allows a party to claim rescission in the case of innocent misrepresentation even where the representation has become a term of the contract. At first glance the buyer's right to rescission and the right to reject the goods may appear to conflict with each other, however this may not be the case. The bars to rescission[200] will for the most part co-exist with the rules for loss of rejection under the SGA.[201] For example the rules on the loss of the buyer's right to reject the goods[202] contained in s 35 SGA, where the buyer has accepted the goods, are compatible with the loss of the right to rescind the contract because of affirmation. Therefore, s 1(a) MRA may not pose a problem in practice, but it could still pose some problems for the buyer if rescission is not available as a remedy. However, there are no reported cases dealing with this issue. It must be pointed out that under s 3 MRA the seller may exclude his liability for a misrepresentation if it satisfies the test of reasonableness under s 11 UCTA. Thus a buyer choosing English law may find him or herself without a remedy if the statement is not a term of the contract and the representation has passed the test of reasonableness under UCTA. The thesis now examines how terms are incorporated into the contract under English law.

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reasonable ground to believe and did believe up to the time the contract was made the facts represented were true'.

[198] Adams and Macqueen (n 182) 528; There are however certain bars to rescission for example: affirmation, lapse of time, *restitution in integrum* and third-party interests.

[199] MRA, s 2(2); See also damages in tort of deceit.

[200] Affirmation, lapse of time, *restitution in integrum* and third-party interests.

[201] Adams and Macqueen (n 182) 530.

[202] See discussion at chapter 3.7.4.

Terms can either be express or implied; the former are explicitly agreed on by the parties, whereas the latter are incorporated into the contracts by the courts, statute or by custom.[203] English law adopts the parole evidence rule, whereby parties are prevented from introducing new information that may vary or contradict the written contractual document.[204] The purpose of the rule is to promote certainty in contracts, yet this is somewhat diminished as there are many exceptions to the rule. These exceptions include vitiating factors such as: misrepresentation, mistake or improper pressure.[205] Also the exception may apply to introduce additional express or implied terms or to rectify the parties' agreement if the written document is inaccurate.[206] The rule cannot be said to promote any strong elements of certainty in English law as it is easily rebuttable.[207] Although the Law Commission[208] recommended the abolition of the parole evidence rule, this was subsequently rejected.[209]

A party may only rely on a term in the contract if they can establish that the term has been incorporated into the contract. A term may be incorporated by signature,[210] reasonable notice,[211] previous dealing or custom.[212] To successfully argue previous dealings, the course of dealing between the parties must be over a reasonable period of time and on the same terms.[213]

Additionally, terms may also be implied into the contract. This can be done by custom, in fact or by law.[214] Implied terms by custom or a market or trade has long

[203] Mindy Chen-Wishart, *Contract Law* (2nd edn, OUP 2008) 397.
[204] See discussion at chapter 3.1.4; Chen-Wishart (n 203) 399.
[205] Poole (n 183) 216.
[206] Chen-Wishart (n 203) 399.
[207] ibid.
[208] Law Commission, *Law of Contract - the Parol Evidence Rule* (Law Com CP 76, 1976).
[209] Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986).
[210] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.
[211] *Olley v Marlborough Court Ltd* [1949] 1 KB 532.
[212] *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125.
[213] ibid.
[214] See discussion at chapter 3.7.4; Chen-Wishart (n 203) 409.

been recognised in English law. In *Hutton v Warren*[215] the court determined that the parties' intentions could be discerned from 'knowing usages'.[216] In *Cunliffe-Owen v Teather & Greenwood*,[217] Ungoed- Thomas J stated that terms implied by custom should be, 'notorious, certain and reasonable'.[218] The term should be well known by people in that trade and they should use it because of its binding effect not because of courtesy or commercial ease.[219] The burden of proving that the term has been implied into the contract falls on the party relying on it.

The courts may also imply a term based on the facts of the case, for example, where there is a need to examine the unexpressed intentions of the parties.[220] The courts will only use this approach where it is necessary. In *Liverpool City Council v Irwin*,[221] Lord Wilberforce stated that, 'in my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity'.[222] The House of Lords rejected the application of the reasonableness test put forth by Lord Denning as the courts could not be seen to be making the contract for the parties.[223] Currently the courts apply the test of 'business efficacy' which requires the term to be obvious and necessary[224] in conjunction with that of the 'official bystander' test where the term is so obvious that it does not need to be expressly stated.[225]

In examining the English law on intent it is evident that the wording of art 8 CISG is broader in its scope and application for three reasons. First, art 8 makes no

[215] (1836) 1 M&W 466.
[216] See discussion below at chapter 4.3.5; Chen-Wishart (n 203) 409.
[217] [1967] 1 WLR 1421.
[218] *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, 1438.
[219] Chen-Wishart (n 203) 409.
[220] Poole (n 183) 231.
[221] [1977] AC 239.
[222] *Liverpool City Council v Irwin* [1977] AC 239, 254.
[223] Chen-Wishart (n 203) 411.
[224] *The Moorcock* (1889) 14 PD 64.
[225] *Shirlaw v Southern Foundries* [1939] 2 KB 206.

distinction between representations and terms, instead it uses the term 'statements' which means that *all* statements made by the parties will be considered when determining if the buyer can exercise the remedy of avoidance. Thus, it can be argued that art 8 CISG minimises the complexity found in English law of having different legal regimes and remedies for statements. Secondly, the wording of art 8 also expressly refers to the 'conduct' of the parties as a means of determining intent. Although English law does not make reference to conduct, one could argue that terms are implied through conduct such as course of dealing, therefore in this regard the two instruments are similar. Thirdly, the wording of art 8(3) excludes the application of the parole evidence rule, therefore all relevant circumstances are considered to determine the parties' intent.[226] Granting that the relevance of this rule has been eroded by numerous exceptions under English law it may not have a significant impact on the buyer's right to terminate the contract. English law and the CISG are also similar in that customs or usages may also be implied terms in the contract.[227] However, the English law approach to implying terms based on the facts of the case may fall outside the scope of the CISG. The thesis recalls the earlier discussion on art 4.8 UNIDROIT where it was argued that supplying omitted terms were not part of the remit of interpretation permitted under art 7 CISG.[228] However, it could be argued that the English law approach is somewhat more cautious than the Principles in that the term must either be obvious or necessary before the courts will imply it into the contract. The English law approach of implying terms based on the facts of a case could possibly be reconciled under the criterion of interpretation with

[226] Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG' (*IICL*, 26 June 2006) <www.cisg.law.pace.edu/cisg/CISG-AC-op3.html> accessed 25 August 2014.
[227] See discussion below at chapter 4.3.5.
[228] See discussion above at chapter 4.2.3.

the observance of good faith in international trade found in art 7(1) CISG where certain terms, although not expressly stated in the contract, would have been included had the parties thought of it. An example of this is a case involving a failure on the part of the buyer to give notice of avoidance when the seller 'unambiguously and definitely declared that it will not perform its obligations'.[229] In that case it was stated that to leave the buyer without the remedy of avoidance for an 'unjustified formalism' would be contrary to the mandate of the CISG.[230]

In this part of the chapter the thesis established that art 8 CISG can be used by the buyer to express his contractual expectations and further that it can be used by the courts to interpret those intentions. Specifically, art 8(1) can be used to interpret the buyer's express, subjective intentions, which can usually be discerned by examining the wording of the contract. In the absence of this the courts can use art 8(2) to examine the objective intentions of the parties. Intent can be gathered from, 'all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'.[231] In subsequent chapters, art 8 will be used to demonstrate that the parties' intent will be an important factor for the buyer in establishing fundamental breach and establishing the right to avoid the contract.[232] Furthermore the use of this provision helps to make the CISG a suitable instrument for international sale of goods contracts.[233]

The next part of this chapter examines the impact of usages on the buyer's right to avoid the contract. The thesis examines art 9 CISG to determine whether the

[229] Germany 15 September 2004 Appellate Court München (*Furniture leather case*) (*IICL*, 05 October 2006) <http://cisgw3.law.pace.edu/cases/040915g2.html> accessed 25 August 2014.
[230] ibid.
[231] CISG, art 8(3).
[232] See discussion at chapters 5, 6 and 7.
[233] Text to n 5.

interpretation of usages can help to clarify issues such as the seller's obligations under the contract, standards of conformity of goods and whether the breach is fundamental to permit avoidance of the contract.

4.3 Usages

The interpretation of usages in the contract can have a significant impact on the buyer's remedy of avoidance. Usages can affect important issues in the contract such as the conformity of the goods and the standards of examination among others.[234] Furthermore, usages help to supplement the agreement reached by the parties.[235]

Usages have played an important role in international trade and have been described by Goode as forming part of the '*lex mercatoria*,' a term used to describe the body of commercial law used by merchants throughout Europe during the Middle Ages.[236] The term *lex mercatoria* is also used to describe that area of transnational commercial law which, is made up of uncodified customs and general principles of commercial law.[237] Usages gain normative force through use by the parties, to be precise the usage is followed because parties feel a 'duty' or that they 'ought' to do so.[238] Thus, the parties regard usages as part of their contractual obligations and the legitimacy of the usage is confirmed.[239] Usages are considered to be more flexible in

[234] See discussion at chapter 5.2.7; Argentina 6 October 1994 National Commercial Court of First Instance (*Bermatex v Valentin Rius*) (*IICL*, 27 July 2009) <http://cisgw3.law.pace.edu/cases/941006a1.html> accessed 31 August 2014; Finland 29 January 1998 Helsinki Court of Appeal (*Steel plates case*) (*IICL*, 14 January 2014) <http://cisgw3.law.pace.edu/cases/980129f5.html> accessed 31 August 2014.
[235] Martin Schmidt-Kessel, 'Article 9' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 193.
[236] Roy Goode, 'Usage and its Reception in Transnational Commercial' (1997) 46 Int'l & Comp LQ 1, 6.
[237] ibid 3.
[238] ibid.
[239] ibid.

nature than laws as they can change and conform more rapidly to the needs of international trade.[240] Honnold states that:

> [t]he world's commerce embraces an almost infinite variety of goods and transactions; a law cannot embody the special patterns that now are current, let alone those that will develop in the future…there are practical limitations on the ability of the parties to envisage and answer every possible question. Many transactions must be handled quickly and informally…an attempt to anticipate and solve all conceivable problems may generate disagreements and prevent the makings of a contract; and the most basic patterns may not be mentioned because, for experienced parties, they "go without saying".[241]

This statement encapsulates the realities of international trade, transactions move rapidly and can be quite informal and therefore usages can be used to facilitate contractual interpretation. This feature can be seen in art 9 CISG which deals with the role of usages.[242]

During the drafting and negotiation of the CISG the issue of usages was highly controversial.[243] Farnsworth notes:

> [v]iewed in the context of the United Nations, trade usage becomes political. Generally, developed nations like usages. Most usages seem to be made in London, whether in the grain or cocoa trade, for example. Developing countries, on the other hand, tend to regard usages as neo-colonialist. They cannot understand why the usages of…the cocoa trade should be made in London.[244]

The next part of the chapter addresses these controversies by examining the legislative history of usages in the CISG. The thesis identifies the main issues of contention amongst the delegates and how these issues were resolved to reflect the current wording of art 9.

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[240] Honnold (n 134) 124.
[241] ibid.
[242] CISG, art 9 states: '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'.
[243] Honnold (n 134) 6; See also Stephen Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions.' (1984) 24 Va J Int' l L 619, 636.
[244] E Farnsworth, 'Developing International Trade Law' (1979) 9 Cal W Int'l LJ 461, 465.

4.3.1 Legislative History of Article 9 CISG

The decision to include a provision on usages in the CISG was controversial the reason being that the interpretation of usages had the potential to create uncertainty.[245] In the drafting of the CISG, developing and socialist countries wanted the role of usages to be minimal, with the USSR, Mexico and Hungary voicing their opposition to the inclusion of the provision.[246] One of the reasons for this opposition stems from the fact that most socialist states stressed the need for planned economies which called for certainty in contractual relationships and it was thought that usages would disrupt this balance.[247] Developed economies such as the United States[248] and United Kingdom[249] wanted usages to play a major role in the CISG because, it was argued, they helped to promote contractual flexibility and economic efficiency.[250]

The wording of art 9 CISG differs greatly in some respects from its predecessor art 9 ULIS.[251] Article 9(1) CISG corresponds to art 9(1) ULIS in that it binds the parties to any usages to which they have agreed, either in their contractual negotiations or in the course of dealings.[252] However, the deletion of the phrase, 'expressly or impliedly' from the CISG means that art 9(1) CISG only refers to

[245] Gyula Eörsi, 'General Provisions' in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale Of Goods* (Juris 1984) 2.06.
[246] UNCITRAL, 'Yearbook: Volume I (1968-1970)' A/CN.9/SER.A/1970 <www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf> accessed 04 March 2014.
[247] Alejandro Garro, 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods' (1989) 23 Int'l Law 443, 476.
[248] Hereinafter referred to as the 'US'.
[249] Hereinafter referred to as the 'UK'.
[250] Garro (n 247) 477.
[251] ULIS, art 9 states: '(1) The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves. (2) They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties. (3) Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned'.
[252] Schlechtriem (n 18) 40.

explicit agreement rather than an implied agreement.[253] This omission means that usages cannot be binding on a contract by implied agreement through art 9(1) CISG.[254] There are some academics who disagree with the reasoning that art 9(1) only allows for express inclusion of usages and argue instead that usages can be explicit, implicit or embodied by conduct.[255] This issue will be examined further when the meaning and purpose of art 9 are examined in the next section.

The latter part of art 9(1) CISG, preserves the criterion in ULIS dealing with 'practices established' between the parties. This criterion focuses on patterns of conduct that exist between the parties and the expectations that are created by this conduct.[256]

However, there is a significant difference in the wording of art 9(2) ULIS from its CISG counterpart. The ULIS provision expressly states that usages will prevail over the Convention in the event that there is a conflict between the two, unless the parties have agreed otherwise. Although the CISG did not expressly retain this hierarchy of usages in its wording, usages will still take precedence over its provisions.[257] The reason for omitting the express wording to this effect was that the delegates agreed that the priority of usages over provisions in the CISG was implied and did not need to be explicitly reflected in the wording of art 9.[258] The general consensus was that the principle of party autonomy under art 6 CISG helped to

[253] Eörsi (n 245) 2.06.
[254] Honnold (n 134) 124.
[255] Peter Huber, 'Some Introductory Remarks on the CISG' in Peter Huber and Alastair Mullis (eds), *The CISG : A new textbook for Students and Practitioners* (Sellier 2007) 236.
[256] Honnold (n 134) 125.
[257] UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975 <www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 March 2014; Michael Joachim Bonell, 'Article 9' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 103.
[258] ibid.

ensure that the primacy of usages was maintained.[259] Therefore it was left to the parties to derogate from or exclude terms of the CISG if they wanted to adopt a contrary intention.[260] This position was supported by the fact that the Czechoslovakian delegation's proposal that the CISG's provisions should prevail over usages lacked support from the other delegations.[261] Under art 9(2) ULIS the reference to 'usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract' was the source of much debate during the drafting of the CISG.[262] This criterion was thought to be too ambiguous as usages could differ from one geographical area to another. Thus, usages that a reasonable person would apply to the contract would differ from each other.[263] Here again, the differences in the political agenda between developed and developing countries arose as it was thought that the wording of art 9(2) ULIS gave too much power to usages, of which a large number were the product of Western European countries and the US.[264] Developing countries were concerned that usages could become applicable to their contracts without being aware of them.[265]

Furthermore, in the drafting of the CISG it was decided that art 9(3) ULIS, which dealt with expressions, provisions or forms of contract commonly used in commercial practice, should be excluded altogether. Delegates were concerned that

[259] ibid.
[260] ibid.
[261] UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975 <www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 March 2014.
[262] Bonell (n 257) 104.
[263] ibid; UNCITRAL, 'Yearbook: Volume II (1971)' A/CN.9/SER.A/1971 <www.uncitral.org/pdf/english/yearbooks/yb-1971-e/yb_1971_e.pdf> accessed 06 March 2014.
[264] UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975 <www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 March 2014; Bonell (n 257) 104.
[265] See discussion at chapter 4.3.4; UNCITRAL, 'Yearbook: Volume I (1968-1970)' A/CN.9/SER.A/1970 <www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf> accessed 06 March 2014; UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975 <www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 March 2014; Bonell (n 257) 104.

commercial terms would be interpreted with the same meaning given in model rules or definitions which may not be known to both parties, especially if the parties were from different economic systems.[266]

The next part of the chapter examines the wording and meaning of art 9 CISG to determine how some of the contentions identified above were resolved and what implications this provision will have on the buyer's right of avoidance.

4.3.2 Meaning and Purpose of Article 9 CISG

Article 9 is similar to most of the other provisions previously examined in the thesis in that the wording is somewhat ambiguous and the terminology is not always clearly defined. In this regard it is the scholarly writings on the subject and case decisions that shape the meaning of this provision.

The word 'usage' is not defined under the CISG. The term 'usage' should be interpreted in its broadest form to include any practice or conduct which is widely known and observed.[267] Bonell supports this by stating:

> [t]he concept of usages in the context of this article…is to be determined in an autonomous and internationally uniform way. It follows that distinctions traditionally made in the various national laws, between 'custom', 'proved trade usages' and 'simple usages'… are irrelevant for the purpose of this Article.[268]

Article 9 can include regional and international usages if the party ought to have known of it.[269] The usage does not have to be published or officially registered for it to be accepted, it can develop through spontaneous practice or alternatively, though a trade association and disseminated to business people for use in the whole of that

[266] Bonell (n 257) 113; UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975 <www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 March 2014.
[267] Honnold (n 134) 124.
[268] Bonell (n 257)110.
[269] Bainbridge (n 243) 658.

trade.[270] Bonell describes this latter process as the 'conscious creation of usages'.[271] The creation of usages can be born of different sources, including: geographical, political, economic, legal and commercial influences.[272] Although the CISG offers no definition of the term 'usage' this does not permit courts resorting to domestic meanings to find a solution. Instead courts should strive to interpret usages autonomously bearing in mind the meaning and purpose of the provision, an approach supported by art 7 CISG.[273]

Article 9(1) refers to those usages which the parties have agreed. This can include the course of conduct that amounts to a practice and can exist even though they are not widely known in international trade.[274] Therefore, under art 9(1) local, regional and national usages will be applicable in accordance with the party's agreement.[275]

Some academics argue that under art 9(1) usages *can* be implied.[276] It is suggested that the wording of art 9(1) does *not* exclude implied usages.[277] To support this approach it is argued that implied usages under this paragraph must be read in conjunction with the provisions of art 8 CISG.[278] Therefore the implied usage would have to be viewed in the context of either what the other party knew or could not have been unaware of[279] *or* alternatively the view of the reasonable person of the same kind in the same circumstances.[280] Bonell states that there can be an

[270] Bonell (n 257)110.
[271] ibid.
[272] Goode (n 236) 11.
[273] See discussion at chapter 3.4.
[274] Franco Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG' (2005) 25 International Review of Law and Economics 314, 333.
[275] ibid.
[276] Bonell (n 257) 106; Huber (n 255) 236.
[277] Bonell (n 257) 106.
[278] See discussion above at chapter 4.2.
[279] CISG, art 8(1).
[280] CISG, art 8(2).

implied usage under art 9(1) when the statement of one of the parties to the contract can be construed as making an implied reference to that usage *and* the party does not expressly object to it.[281] He goes on to state that these implied statements can only be applicable if they satisfy the criteria of art 9(2).[282] The thesis disagrees with this argument, since if this was the case, the wording of art 9(2) would be rendered superfluous. Therefore, the thesis argues that the only logical reading of art 9 would be that even though the wording of art 9(1) does not *exclude* implied usages, the very fact that art 9(2) *does include* the word 'impliedly' would necessarily restrict the scope of the first paragraph to usages which had been expressly agreed. A usage would be applicable by virtue of art 9(1) when a contract expressly states that it is to be governed by those usages, as the parties' agreement to such usages would be clearly discernible from the contract itself.[283] The interpretation of other usages which are *not* expressly stated in the wording of the contract would have to be judged by the rules of intention embodied in art 8.[284] For example, the Austrian Supreme Court considered a case involving the sale of propane.[285] Here, the parties agreed to enter into a contract that would incorporate the sellers' terms and conditions which amounted to usages in the contract.[286] The seller failed to make known to the buyer these terms and conditions.[287] Therefore, the court held that although the parties could be bound by any agreed trade practices or usages, art 9(1) had to be interpreted in the light of art 8(1) to the effect that a party must have known of the intent of the other party before they could be expected to perform their

[281] Bonell (n 257)106; Huber (n 255) 236.
[282] Bonell (n 257)106.
[283] Honnold (n 134) 124.
[284] ibid.
[285] Austria 6 February 1996 Supreme Court (*Propane case*) (*IICL*, 19 June 2007) <http://cisgw3.law.pace.edu/cases/960206a3.html> accessed 06 March 2014.
[286] ibid.
[287] ibid.

obligations.[288] To support this view the courts in their interpretation of art 9(1) have confirmed that usages under this part of the provision do not have to be widely known or internationally accepted as long as the parties have agreed to it.[289] Given this interpretation, the thesis argues that it would be unsound to allow usages which are not widely known in international trade to be impliedly read into a contract as it would increase uncertainty for the parties and would lead to obligations imposed on parties of which they are unaware. This could pose potential problems for the buyer seeking to avoid the contract. An example of this can be seen if there is a local usage which establishes a period of time for examining the goods for non-conformities.[290] If the usage is presumed to be impliedly incorporated into the contract and the usage is not one that is widely known, the buyer might lose his right to rely on the non-conformity without even being aware of the usage.

The next issue to be examined is what kinds of behaviour will amount to a 'practice' under the CISG. The CISG does not offer any definition of 'practices'. It is suggested that practices are patterns of conduct which are observable in the business relations between the two parties.[291] These patterns of conduct can only be established as 'practices' when they have been carried out over a certain length of time and have resulted in a number of contracts.[292] For example, in a case involving a Swiss seller and an Italian buyer for the sale of two cargoes of white urea, the courts held that the seller's contention that there was an established practice between the parties under which the buyer was bound to pay at the seller's bank was

[288] ibid.
[289] Austria 15 October 1998 Supreme Court (*Timber case*) (*IICL*, 21 November 2006) <http://cisgw3.law.pace.edu/cases/981015a3.html> accessed 07 March 2014.
[290] See discussion at chapter 5.2.7; Finland 29 January 1998 Helsinki Court of Appeal (*Steel plates case*) (*IICL*, 14 January 2014) <http://cisgw3.law.pace.edu/cases/980129f5.html> accessed 31 August 2014.
[291] Bonell (n 257) 105.
[292] Germany 13 April 2000 Lower Court Duisburg (*Pizza cartons case*) (*IICL*, 7 December 2006) <http://cisgw3.law.pace.edu/cases/000413g1.html> accessed 06 March 2014.

unfounded.[293] The court stated that, under art 9(1), two previous contractual relationships were not sufficient to establish a practice between the parties.[294] Therefore, a previous course of dealing, if repeated a sufficient number of times, between the parties will automatically be used in contractual interpretation unless the parties specifically exclude its application.[295] Practices based on previous course of dealings between the parties can have serious consequences for the contract.[296] For example, if the seller previously permitted deviations from the notice requirements in accordance with art 39 CISG they may be prevented from invoking it under the present contract.[297]

The thesis will move on to examine the wording of art 9(2). This provision was one of the most strongly debated in the CISG and represents a 'hard-won compromise'.[298] The CISG does not define 'usages' therefore the range of terms covered is extensive once it meets the criteria of art 9(2). Article 9(2) deals with usages which the parties have 'impliedly' made applicable to their contract, which can be applied in two ways. The first way in which they can be applicable is when the 'parties knew or ought to have known of the usage' in question and the second method is when the usage is one which 'in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'.[299] In examining the first part of this provision we can see that the wording 'parties knew or ought to have known' establishes a connection between the

[293] Switzerland 3 December 1997 Civil Court Basel (*White urea case*) (*IICL*, 10 February 2006) <http://cisgw3.law.pace.edu/cases/971203s2.html> accessed 07 March 2014.
[294] ibid.
[295] See discussion above at chapter 4.1; Bonell (n 257) 105.
[296] Bonell (n 257) 105.
[297] ibid; See discussion at chapter 5.2.7.
[298] UNCITRAL, 'Official Records II' (1991)' A/CONF.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> at 266 accessed 07 March 2014.
[299] CISG, art 9(2).

usage and the implied intentions of the parties.[300] Thus, the words 'parties knew' mean that even though the reference to the usage is not express, the fact that the parties did not exclude it, will make it applicable to their contract on the presumption that they intended that the usage should form part of the contract.[301] This can be seen in *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc* a CISG case decided in the US courts involving the sale of pharmaceuticals where it was held that, 'usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties'.[302] The controversial part of this provision concerns the imposition of usages where the parties 'ought to have known' of them. Bonell criticises this criterion as amounting to a 'legal fiction' of consent which can lead to the parties being bound to terms of which they may be unaware.[303] These concerns were expressed by many developing and socialist countries at the time of drafting who argued that usages could obtain binding force and that they were for the most part the products of Western developed nations which would disadvantage other countries. [304] However, the phrase 'ought to have known' is redundant when one examines the next part of the provision which covers those usages which are widely known in international trade.[305] It would be unlikely that a party could argue that he was unaware or ought not to have been aware of the usages that meet the requirements set out in the second part of art 9(2).[306] It is the second part of art 9(2) that requires closer examination as the criteria is viewed from an objective

[300] Bonell (n 257) 107.
[301] ibid.
[302] *Geneva Pharmaceuticals Technology Corp v Barr Laboratories Inc et al* (2002) 201 F Supp 2d 236, 281.
[303] Bonell (n 257) 107.
[304] Garro (n 247) 478.
[305] Enderlein and Maskow (n 123) 68.
[306] ibid.

perspective. The usage must be one that is regularly observed in the type of trade in which the parties are involved; furthermore the usage must be regularly observed in the type of contract commonly used for that trade. Also the usage must be one which is widely known in international trade. This latter requirement was included in order to restrict those usages which were used only in the domestic sphere. For example, a cotton exporter from Egypt can no longer rely on a local usage when dealing with a buyer from the US unless that usage is one which fulfils the requirements of art 9(2). A local usage could also fulfil this requirement if the foreign party conducts business transactions of this kind on a regular basis.[307] Accordingly, a seller who has been engaging in business in a country for many years and has repeatedly concluded contracts of the type involved in the particular trade concerned is obliged to take national usage into consideration. It will be for the party who is alleging that the usage exists to prove that it meets the burden set out in art 9(2).[308] After examination of this provision the thesis concludes that art 9(2) is not concerned with the intentions of the parties but rather with the fact that the usage is regularly observed. This approach is a cause of concern mainly because the CISG proposes to be an instrument which places emphasis on party autonomy as an important aspect of contractual interpretation.[309] However, art 9(2) appears to circumvent this autonomy. It is important to note that international sales contracts often do not address every issue or contingency that may arise.[310] Therefore this part of the provision imposes the will of the CISG over that of the contracting party on

[307] Austria 9 November 1995 Appellate Court Graz (*Marble slabs case*) (*IICL*, 26 July 2012) <http://cisgw3.law.pace.edu/cases/951109a3.html> accessed 07 March 2014.
[308] Germany 29 June 2006 District Court Gera (*Laser system case*) (*IICL*, 27 March 2009) <http://cisgw3.law.pace.edu/cases/060629g1.html> accessed 14 March 2014.
[309] See discussion above at chapter 4.1.
[310] Honnold (n 134) 124.

those issues where the contract does not make specific provisions.[311] The CISG permits usages that fulfil the criteria of art 9(2) to be used in contractual interpretations. However, this may be contrary to the parties' intentions, for instance the provision states that parties are considered to make the usages applicable 'unless otherwise agreed.' Would this mean an express exclusion is required to prevent certain usages from being applicable? The draft provision of the CISG offers no further elucidation on this point. However, there was a vigorous debate amongst the delegates on the fictitious agreement on which this provision is based.[312] There are potential problems which can arise from usages which are fictitiously agreed when all of the requirements of art 9(2) are met. For example usages such as 'FOB'[313] and 'CIF'[314] are common shipping terms which have different meanings in national laws and INCOTERMS.[315] However in applying art 9(2) these terms have been interpreted by the courts solely by their INCOTERMS definition rather than with a view to the parties' intent.[316] The issue of interpretation of trade terms such as 'CIF' and 'FOB' under art 9(2) were a cause of concern of some delegates at the drafting of the CISG.[317] The French delegate suggested that with the deletion of art 9(3) ULIS from the CISG, the use of INCOTERMS should be dealt with under art 8(3) CISG.[318] The Soviet delegate was concerned that terms such as 'FOB' had different meanings under the national law than that of the ICC and parties would be confused

[311] ibid.
[312] Enderlein and Maskow (n 123) 70.
[313] Free on Board.
[314] Cost, Insurance, Freight.
[315] See discussion below at chapter 4.3.5.
[316] Enderlein and Maskow (n 123) 70.
[317] Pace Law School Institute of International Commercial Law, 'UNCITRAL Summary Records of Meetings of the First Committee 7th meeting' (*IICL*, 29 January 1999) <www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html> accessed 14 March 2014.
[318] ibid para 44.

as to what meaning the term should have in the contract.[319] Furthermore, the Japanese delegate argued against the use of INCOTERMS definition to interpret these terms because they were not well known in all countries and they did not translate very clearly thus making them difficult to understand. The delegate also suggested that the interpretation problem should be left to be determined under art 8.[320] During the negotiations of the CISG the vote to incorporate trade terms such as INCOTERMS under art 9 was rejected by a vote of 21 to 16.[321] Despite this rejection, courts have interpreted INCOTERMS as falling within the definition of art 9(2).[322] In one decision, the US courts held that the term 'CIF New York Seaport' was to be construed under the INCOTERM definition of 'CIF' which means that the seller is responsible for paying the cost, freight, and insurance coverage necessary to bring the goods to the named port of destination, yet the risk of loss passes to buyer at the port of shipment.[323] The buyer tried to argue against this on the grounds that the INCOTERMS definition was inapplicable as it had not been explicitly incorporated into the contract.[324] However, the court rejected this argument stating that even though reference to INCOTERMS was not explicit the terms were widely known and observed in international trade as standard definitions for delivery terms

[319] ibid para 52, 53.
[320] ibid para 55.
[321] ibid para 61.
[322] United States 26 March 2002 Federal District Court [New York] (*St Paul Guardian Insurance Company et al v Neuromed Medical Systems & Support et al*) (*IICL*, 9 January 2008) <http://cisgw3.law.pace.edu/cases/020326u1.html> accessed 07 March 2014; Argentina April 2003 Juzgado Comercial Buenos Aires (*Autoservicio Mayorista La Loma SA v Quiebra v Incidente de Verificacion (Cosvega SL*) (*IICL*, 09 December 2009) <http://cisgw3.law.pace.edu/cases/030400a1.html> accessed 31 August 2014; United States 7 February 2006 Federal District Court [Texas] (*China North Chemical Industries Corporation v Beston Chemical Corporation*) (*IICL*, 09 January 2008) <http://cisgw3.law.pace.edu/cases/060207u1.html> accessed 31 August 2014.
[323] United States 26 March 2002 Federal District Court [New York] (*St Paul Guardian Insurance Company et al v Neuromed Medical Systems & Support et al*) (*IICL*, 9 January 2008) <http://cisgw3.law.pace.edu/cases/020326u1.html> accessed 07 March 2014.
[324] ibid.

so the reference to 'CIF' was to be interpreted in accordance with INCOTERMS.[325] In a case not governed by the CISG this reasoning was followed in a decision handed down by the Italian courts, with the court making an express reference to the CISG and determining that the 'FOB' clause was binding as an international trade usage.[326] This clause was to be interpreted in accordance with INCOTERMS even though there was no indication of this meaning in the contract terms.[327]

The thesis is not disputing the contention that INCOTERMS may fall within the definition of art 9(2). However, it suggests that decision makers must tread carefully when applying an INCOTERM meaning to a term and that they should not make wide generalisations without first examining whether the term is one which fulfils the criteria of art 9(2). If parties fail to make a stipulation as to whether INCOTERMS should apply to their contract it should not be automatically assumed that they do apply; instead, decision makers should look at the surrounding circumstances of the contract, including negotiations, previous dealings and whether or not parties belong to countries which may ascribe another meaning to terms such as 'FOB' or 'CIF'. In this regard the proposal made by the drafting delegates that commercial terms and expressions should be dealt with under the provisions of art 8 were correct in that art 8 does not carry with it the power to unknowingly bind parties as is seen with the application of art 9(2).[328] Article 8(3) provides that to determine intent one should look to, 'all relevant circumstances of the case which includes the negotiations, any practices which the parties have established between

[325] ibid.
[326] Italy 24 March 1995 Appellate Court Genova (*Marc Rich & Co AG v Iritechna SpA*) (*IICL*, 12 August 2012) <http://cisgw3.law.pace.edu/cases/950324i3.html> accessed 07 March 2014.
[327] ibid.
[328] Pace Law School Institute of International Commercial Law, 'UNCITRAL Summary Records of Meetings of the First Committee 7th meeting' (*IICL*, 29 January 1999) <www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html> accessed 14 March 2014 para 4

themselves, usages and any subsequent conduct of the parties'.[329] If art 8 CISG was used in the aforementioned cases the outcome may have been different. For instance where the term 'CIF' is used without a clear definition, the courts should not automatically interpret the usage in accordance with INCOTERMS. Rather the courts should look to the pre-contractual negotiations, previous practices and conduct of the parties to determine what the parties' intent was on incorporating the term into the contract. This approach would be useful in cases where the parties may be unfamiliar or uncertain about INCOTERMS.[330] It may be worth noting that the INCOTERMS drafting group consisted of English, German, French, Belgian and American representatives, and that there was a glaring absence of any representatives from developing or socialist countries.[331] This is a good example of the western dominated process of negotiating the meanings attached to usages and explains why developing countries are reluctant to accept and use these terms in their contracts.[332]

The next section of this chapter examines the role of usages under the Principles to see if these rules could help to supplement the ambiguities and gaps under art 9.[333]

4.3.3 Can the UNIDROIT Principles be used to Interpret Article 9 CISG?

The provision on usages is found in art 1.9 UNIDROIT.[334] The wording of art 1.9(1) UNIDROIT and art 9(1) CISG are identical, both provisions treat usage and

[329] See discussion at chapter 4.2.
[330] For example: Soviet Union, Japan, Belgium; Pace Law School Institute of International Commercial Law, 'UNCITRAL Summary Records of Meetings of the First Committee 7th meeting' (*IICL*, 29 January 1999) <www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html> accessed 14 March 2014.
[331] Jan Ramberg, *ICC Guide to INCOTERMS* 2010 (ICC 2010).
[332] In chapter five the thesis will examine the issue of the interpretation of INCOTERMS and now they can impact the buyer's right to avoid the contract.
[333] It has been established in chapter three that in some cases it may be permissible to use the UNIDROIT Principles to supplement 'gaps' or clarify ambiguous wording in the CISG for those matters governed by the CISG but not expressly stated.
[334] UNIDROIT, art 1.9 states: '(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such usage would be unreasonable'.

practice as two separate concepts. The official commentary on the Principles states that practices between parties will automatically be applicable to the contract unless the parties have expressly excluded them.[335] Furthermore, the practice must be one which has been followed on a continuous and consistent basis.[336] Article 1.9(2) UNIDROIT has some similarities with art 9(2) CISG in that they have the power to bind the parties if the usage is one that is widely known to and regularly observed in international trade. The official commentary to the Principles embodies decisions already reached by the courts on the CISG; namely, that a national usage can fall under this heading if it is used by foreigners doing business in that country.[337] Article 1.9(2) UNIDROIT differs from art 9(2) CISG in one respect, namely that parties will not be bound to the usage 'where the application of such usage would be unreasonable'. This exception to the application of usages widely known to and regularly observed in international trade is designed to cover situations where something has happened that changes the circumstances of the transaction. The official commentary to this provision provides the example of where the goods are to be inspected at the port by a particular agency but there is a wide-spread strike preventing inspection.[338] Therefore, it can be argued that where there are circumstances that render the applicability of the usage unreasonable it would be unfair to hold the parties to a strict application of that usage. Although the CISG does not address this possibility in the wording of art 9 CISG, the concept of reasonableness is a general principle of the CISG and therefore the two provisions

[335] UNIDROIT, art 1.9, official commentary para 2.
[336] UNIDROIT, art 1.9, official commentary para 2.
[337] UNIDROIT, art 1.9, official commentary para 4.
[338] The International Institute for the Unification of Private Law, 'UNIDROIT Principles 2010' (*UNIDROIT*, 2014) <www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf unidroit principles> accessed 14 March 2014.

can be reconciled.[339] Furthermore, the term reasonableness is referred to in thirty-seven articles of the CISG.[340] This approach is also supported by the requirement to interpret the CISG in accordance with the observance of good faith in international trade as set out in art 7(1).[341]

Therefore, the role of usages under the Principles are, for the most part identical to the CISG. However the Principles offers further guidance and expressly excludes the application of usages in circumstances where it would be unreasonable to apply them to the contract. This approach is compatible with the general principles of the CISG and could prove useful to the buyer's remedy of avoidance. For example if the buyer is required by usage to make examination of the goods at the port of discharge but is unable to do so because of a strike or some other interference the buyer will not be precluded for relying on any non-conformities which may arise later on.[342]

The chapter now examines how usages can affect the buyer's remedy of avoidance under the CISG.

4.3.4 The Impact of Article 9 CISG on the Buyer's Remedy of Avoidance

The interpretation of usage and practices could have a significant effect on the buyer's remedy of avoidance under the CISG. As the CISG allows for a wide range of usages to supplement the agreement reached by the parties, they can have an impact on relevant issues such as standards of conformity of the documents and the goods, the ability of the buyer to examine the goods and to comply with notice

[339] Jorge Oviedo Albán, 'Remarks on the Manner in which the UNIDROIT Principles may be used to Interpret or Supplement CISG Article 9' (*IICL*, 5 January 2007) <www.cisg.law.pace.edu/cisg/principles/uni9.html#er> accessed 14 March 2014; See also Albert Kritzer, 'Reasonableness' (*IICL*, 23 January 2001) accessed 14 March 2014.
[340] Albert Kritzer, 'Reasonableness' (*IICL*, 23 January 2001) accessed 14 March 2014.
[341] See discussion at chapter 3.4.3.
[342] Switzerland 25 February 2002 District Court Schaffhausen (*Machines, devices and replacement parts case*) (*IICL*, 02 June 2004) <http://cisgw3.law.pace.edu/cases/020225s1.html> accessed 18 November 2014.

requirements.[343] Furthermore, interpretations of delivery terms such as 'CIF' and 'FOB' may have an impact on the parties' obligations under the contract such as timely delivery, passing of property and risk.[344] As pointed out earlier, in the absence of any express stipulations, the courts have interpreted the delivery term 'CIF' in accordance with its INCOTERM definition. This means that the seller's obligation is to 'deliver the goods on board the vessel at the port of shipment on the date or within the agreed period'.[345] Furthermore the seller is to, 'provide the buyer without delay with the usual transport document for the agreed port of destination'.[346] Any breach of these obligations would entitle the buyer to avoid the contract for fundamental breach as time is of the essence in these kinds of transactions. Usages may also have an impact in certain commodity markets where standards of non-conformity may already be established; these standards could affect the buyer's ability to argue fundamental breach of contract.[347] Leisinger uses the example of usages under Stock Exchange for Agricultural Products in Vienna where issues such as conformity and avoidance are governed by the regulations of that exchange.[348] These usages dictate that goods are non-conforming if the grain contains moisture content greater than 14.5%,[349] and that the buyer can avoid the

[343] Argentina 6 October 1994 National Commercial Court of First Instance (*Bermatex v Valentin Rius*) (*IICL*, 27 July 2009) <http://cisgw3.law.pace.edu/cases/941006a1.html> accessed 31 August 2014; Finland 29 January 1998 Helsinki Court of Appeal (*Steel plates case*) (*IICL*, 14 January 2014) <http://cisgw3.law.pace.edu/cases/980129f5.html> accessed 31 August 2014; Austria 27 February 2003 Supreme Court (*Frozen fish case*) (*IICL*, 15 February 2006) <http://cisgw3.law.pace.edu/cases/030227a3.html> accessed 14 March 2014.
[344] Germany 28 February 1997 Appellate Court Hamburg (*Iron molybdenum case*) (*IICL*, 12 September 2007) <http://cisgw3.law.pace.edu/cases/970228g1.html> accessed 15 March 2014.
[345] INCOTERMS 2010, r A4.
[346] INCOTERMS 2010, r A8.
[347] Leisinger (n 114) 136.
[348] ibid.
[349] Practice part B special provisions for trade in various goods, s 81; Börse für landwirtschaftliche Produkte in Wien, 'Usancen Teil B Sonderbestimmungen für den Handel mit einzelnen Waren' <www.boersewien.at> accessed 02 September 2014.

contract if the goods are of a different origin or age.[350] If these usages were to be incorporated into the contract under art 9, they would displace the provisions dealing with these issues under the CISG. Therefore, it is important that parties are aware of the impact that usages could have on the contract, especially those incorporated under art 9(2).[351]

The next part of this chapter examines how English law would approach the issues of usages under the contract to determine if these laws would provide a more comprehensive approach than the CISG.

4.3.5 The English Law Approach to Usages

Historically usages have played a significant role in international trade. Terms implied by customs, trade usages and practices were often used to protect the parties' expectations.[352] In the 17th and 18th centuries, under the law merchant system,[353] merchants from a particular mercantile community would employ a set of principles and regulations which were customary practice to resolve disputes.[354] However, this system was superseded by the proliferation of the common law.[355] The codification of the law in this area, which resulted in the Sale of Goods Act 1893, was criticised as being inflexible and not able to deal with the realities of international trade.[356] Berman and Kaufman argued that:

> British jurists did not think of the common law -- now including the law merchant -- as a highly flexible set of principles to be continually reinterpreted in the light of new customs. Once the court declared a

[350] Practice Part B special provisions for trade in various goods, s 34.
[351] The relevance of art 9 on the buyer's right to avoid the contract will be examined further in chapter five of the thesis.
[352] Bainbridge (n 243) 626.
[353] *Lex mercatoria.*
[354] Bainbridge (n 243) 626.
[355] ibid.
[356] ibid 627; See also John Honnold, 'The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law' in Clive Schmittoff (ed), *The Sources of the Law of International Trade* (Praeger 1964) 73.

> custom, it was not generally to be disturbed by inconsistent practices and understandings of merchants.[357]

The thesis disagrees with the contention above and points out that even though the SGA does not make reference to usages, the English common law still allows for terms to be implied by usage.[358] There are certain criteria that need to be satisfied for the usage to be binding.[359] The first requirement is that the usage cannot contradict mandatory law. In this regard English law differs from the CISG, as noted earlier if a usage is in conflict with the latter it will displace the rules in the CISG, thus preserving party autonomy. It could be argued that this approach gives the CISG greater flexibility over English law as parties can incorporate usages that readily address the needs of the particular trade and may prove more conducive to the performance of the contract. The second requirement is that the usage be reasonable. This is demonstrated in the case *Ropner v Stoate Hosegood & Co* where the usage at the port of Bristol stipulating that unloading was to be completed at a rate of 5000 tons per day regardless of the size and equipment of the vessel, was deemed unreasonable.[360] This approach is similar to the position in the CISG, even though this is not expressly stated in art 9 CISG, reasonableness is considered a general principle under the CISG.[361] Further, as noted in the previous section, the Principles adopts a similar approach and also excludes the incorporation of unreasonable usages.[362]

The third requirement is that the usage be well-known, Chen-Wishart argues that it must be 'well-known by those doing business in the particular trade or place and

[357] Harold Berman and Colin Kaufman, 'Law of International Commercial Transactions (Lex Mercatoria)' (1978) 19 Harv Int'l L J 211, 227; Bainbridge (n 243) 627.
[358] *Hutton v Warren* (1836) 1 M & W 466.
[359] Chen-Wishart (n 203) 409.
[360] (1905) 10 Com Cas 73.
[361] See discussion at chapter 3.5.
[362] See discussion above at chapter 4.3.3.

such that an outsider making inquiries could discover it'.[363] This is demonstrated in the case of *Grissell v Bristowe* where it was accepted that there was a usage on the London Stock Exchange that the buyer could relieve himself of liability to the seller by transferring shares to another named party.[364] English law recognises that the usage may be implied into the contract even though it is subjectively unknown to the other party.[365] This approach has been justified on the basis of certainty and the protection of reasonable expectations.[366] The thesis recalls the discussion above on the application of art 9(2) CISG where parties could be bound to a usage they ought to have been aware of, especially one that is widely known in international trade. Here it can be observed that the English law approach is similar to that of the CISG.

The fourth requirement is that the parties must recognise the usage as binding, thus viewing it as a legal obligation rather than commercial convenience.[367] In *Libyan Arab Foreign Bank v Bankers Trust Co* the plaintiffs kept an account in an American branch of the defendant's bank.[368] When the plaintiffs requested to withdraw their money, the defendants argued that it was a usage that any withdrawals of this kind would have to be routed through New York, and since the US government had implemented a freeze order on all Libyan property in the US, they would be unable to comply with the plaintiff's request. This argument failed as the defendants failed to prove that the usage was believed by the parties to be legally binding.[369] A similar judgment was reached in *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria*, where Slade LJ stated that, 'there is…the world of difference between a course of conduct which is frequently…followed…as

[363] Chen-Wishart (n 203) 409.
[364] (1869) LR 4 CP 36.
[365] Poole (n 183) 231.
[366] Chen-Wishart (n 203) 410.
[367] ibid 409.
[368] [1989] QB 728; Goode (n 236) 8.
[369] [1989] QB 728, 759.

a matter of grace and a course which is habitually followed, because it is considered that the parties concerned have a legally binding right to demand it'.[370] The thesis finds this requirement to be unclear in the sense that if the parties had habitually followed a practice, regardless of the reason, it *should* be implied as a term in the contract as this would not only be the intention of the parties but would also lead to certainty and predictability. Furthermore it would be difficult for the party alleging the usage to prove 'belief' in its binding nature. Additionally this requirement would make it difficult for new usages to develop if it were dependent on the parties' belief in its legally binding nature. As such the thesis argues that art 9 CISG offers a more comprehensive approach to usages in that they can be expressly agreed between the parties or implied because the parties ought to have known of it and further they are regularly observed in international trade. The last requirement under English law is that the usage cannot contradict the express terms of the contract. This approach is consistent with the principle of freedom of contract found in English contract law.[371] This requirement can be reconciled with the general principle of party autonomy under the CISG.[372]

With regard to the issue of INCOTERMS as usages under English law, these terms are not binding in English courts. If parties wish to incorporate these terms they would have to expressly stipulate this in the contract.[373] In the absence of an express stipulation, the approach of the English courts has been to exclude the applicability of these terms where there is ambiguity as to whether the party intended

[370] [1983] QB 856, 874.
[371] See discussion at chapter 3.7.3.
[372] See discussion above at chapter 4.1.
[373] Clive Schmitthoff, *International Trade Usages* (Institute of International Business Law and Practice 1987) 38.

the term to have the INCOTERMS definition.[374] To add further confusion English law has its own definitions, developed through the common law, for delivery terms like 'CIF' and 'FOB'. For example, in the English common law there are three types of 'FOB' contracts, all of which vary the sellers' responsibilities.[375] Additionally the documentary requirements for a 'CIF' contract under English law are stricter than its INCOTERMS counterpart.[376] These differences in the meaning of delivery terms 'CIF' and 'FOB' could result in the buyer being unable to avoid the contract if the seller's obligations have been altered as a result of a different interpretation. Therefore, in light of these uncertainties, the thesis argues that art 9(2) CISG provides a more suitable option for international contracting parties as CISG case law has interpreted INCOTERMS as usages widely known and regularly observed in international trade.[377]

In this part of the chapter the thesis established that art 9 can be used by the buyer to incorporate usages and practices into the contract. These terms could help to supplement the agreement between the parties. Specifically art 9(1) can be used to incorporate usages and practices expressly agreed upon by the parties. In the absence of this the courts can use art 9(2) to incorporate usages, 'of which the parties knew or ought to have known and which in international trade is widely known to, and

[374] *Stora Enso Oyi v Port of Dundee* [2006] CSOH 40.
[375] The three versions include a 'classic FOB, FOB with additional services, simple FOB. *Pyrene & Co v Scindia Steam Navigation Co* [1954] 2 QB 402; Ondřej Vondráček, 'Selling Goods Across the Channel: Comparative Aspects of an International Sales Contract' (*The Common Law Review*, 2007) <www.commonlawreview.cz/selling-goods-across-the-channel-comparative-aspects-of-an-international-sales-contract> accessed 07 March 2014.
[376] *Johnson v Taylor Bros & Co Ltd* [1920] AC 144; compare with CIF A8 INCOTERMS 2010.
[377] Text to n 5.

regularly observed by, parties to contracts of the type involved in the particular trade concerned'.[378]

4.4 Conclusion

This chapter provided an in-depth examination of the legislative history, wording and the meaning of arts 6, 8 and 9 CISG. The chapter has demonstrated that the use of these provisions will aid in the interpretation of the contract and to discern the parties' intent in the event of a dispute. Additionally, buyers can refer to these provisions when drafting the sales contract to reflect their contractual expectations.[379] Specifically, art 6 allows buyers to set their own thresholds for avoidance and fundamental breach. Furthermore, the use of arts 8 and 9 could have a profound influence on establishing the lawful availability and exercise of the remedy of avoidance. This is of particular importance with regard to breaches of the seller's obligation to deliver conforming goods. This chapter has demonstrated that the use of these provisions reflects the flexible nature of the CISG and makes it a suitable instrument for international sale of goods. In particular these provisions will help to make the buyer's remedy of avoidance suitable for all types of breaches and contracts that the CISG was intended to govern.[380] The next chapter examines the concept of the buyer's right of avoidance as a remedy[381] and its main requirement of fundamental breach.[382] The meaning, implications and justifications for having the remedy will be discussed and analysed.

[378] In subsequent chapters art 9 will be used to demonstrate that usages could have a significant impact on the buyer's remedy of avoidance. Specifically usages can affect the buyer's right to avoid the contract for issues such as the conformity of the goods and standards of examination.
[379] See discussion at chapter 5.1.2.
[380] Text to n 5.
[381] CISG, art 49.
[382] CISG, art 25.